UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/669
4 November 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 669

Case No. 595: KHAN

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, First Vice-President, presiding; Mr. Luis de Posadas Montero, Second Vice-President; Mr. Mayer Gabay;

Whereas, on 29 July 1993, Shafiuddin Khan, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), filed an application in which he requested, in accordance with article 12 of the Statute of the Tribunal, the revision of Judgement No. 563, rendered by the Tribunal on 2 July 1992;

Whereas the application contained pleas which read, in part, as follows:

"III. PLEAS

The Applicant hereby applies to the Tribunal for a revision of Judgement No. 563, case No. 595: Khan due to the following factors:

1. The discovery of a very important correspondence of confidential nature between [the UNICEF Representative, Addis Ababa] and Director, DOP [Division of Personnel], New York dated 7 November 1989 not copied to the Applicant ... [which] if brought to the attention of the Tribunal could have played a decisive role when the judgement was given. (Judgement No. 563)

2. The Tribunal's observation in its Judgement No. 563, case No. 595: Khan that 'there is no suggestion, in the view of the Tribunal, that the Applicant was dissatisfied with the procedure followed' clearly signifies that the Tribunal was ignorant of the fact that the Applicant has expressed his dissatisfaction ...

3. ... The Tribunal has not delivered justice to a poor worker of the United Nations with outstanding performance on record for more than 26 years of continued service and relied only upon the Respondent's version ...

..."

Whereas the Respondent filed his answer on 21 January 1994;

Whereas the Applicant filed written observations on 28 April 1994;

Whereas, on 14 July 1994, the Respondent filed an additional statement and on 14 September 1994, the Applicant provided his comments thereon;

Whereas, on 2 October 1994, the Applicant submitted an additional statement and filed further documents;

Whereas, on 26 October 1994, the Applicant submitted an additional statement;

Whereas the facts in the case have been set forth in Judgement No. 563.

Whereas the Applicant's principal contentions are:

1. The Tribunal and the Applicant were unaware at the time the Tribunal rendered Judgement No. 563 of a memorandum dated 7 November 1989, from the UNICEF Representative in Addis Ababa, transmitting the results of an investigation of the Applicant to the Dircctor, Division of Personnel at Headquarters.

2. The Respondent did not follow the procedures set forth in administrative instruction CF/AI/1990-05 on "Revised Disciplinary Measures and Procedures".

3. The Director of Personnel had no legal authority to refer the Applicant's case to the Joint Disciplinary Committee without the explicit recommendation of the Head of the Office.

4. The Tribunal mistakenly indicated that "there is no suggestion in the view of the Tribunal, that the Applicant was dissatisfied with the procedure followed."

Whereas the Respondent's principal contentions are:

1. An application for revision of a final judgement must be based on the conditions set out in article 12 of the Statute of the Tribunal and not on the Applicant's views on the merits of his or her claims.

2. There is no basis for the revision of Judgement No. 563, pursuant to article 12 of the Statute of the Tribunal.

The Tribunal, having deliberated from 19 October to 4 November 1994, now pronounces the following judgement:

I. The Applicant seeks revision of Judgement No. 563 and oral proceedings. The Tribunal considers that the file before it is adequate and finds no need for oral proceedings. The Applicant's main ground for revision is that he was not given a copy of the memorandum sent by the UNICEF Representative, transmitting to Headquarters the Applicant's answer to the charges levelled against him. The text of the memorandum reads, in part, as follows:

> "...
>
> I think that he answered in a very detailed way to all questions; it will be up to DOP [Division of Personnel] to check all the technical matter on which I am not an expert.
>
> ... I did delegate [the Applicant] to sign short-term and fixed-term contracts, considering that, for short term, UNICEF Addis Ababa created internal rules and for fixed-term contracts, after the suggestion of SAP [Selection Advisory Panel] and APC [Appointment and Placement Committee], with

> the endorsement of the Representative, the signature of the contract becomes a pure formality.
>
> The renewal of a GS [General Service] fixed-term contract also remains a formality if the supervisor writes a letter stating that the staff member's performance is, without doubts, 'good'.
>
> For National Officers' contracts, all matters, including the 'formalities' of the contract, remain, of course, in the hands of the Representative.
>
> Your early comments on [the Applicant's] answers will be very much appreciated."

The Applicant also claims that the UNICEF Representative should have acted in accordance with paragraph 6 of CF/AI/1990-05 which reads as follows:

> "6. The Head of Office shall communicate the results of the investigation and recommend to the Director of DOP [Division of Personnel], Headquarters within five working days from the date the staff member's response was due whether:
>
> (a) To withdraw the charges and close the matter;
> (b) To summarily dismiss the staff member for serious misconduct;
> (c) To refer the case to a JDC [joint disciplinary committee] for advice."

II. The Applicant alleges that the memorandum omitted the recommendations required by paragraph 6 of CF/AI/1990-05 while it included considerations apparently justifying some aspects of the Applicant's conduct.

The Applicant also submits that a phrase included in paragraph VIII of Judgement No. 563 shows that the Tribunal "was ignorant of the fact that the Applicant ... expressed his dissatisfaction with the procedures followed."

III. The Tribunal recalls that, according to article 12 of its Statute, a judgement is subject to revision only in the case of "the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the

Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence."

It is to be noted that article 12 requires, in the first place, that the new fact be of a decisive nature and also that it should have been unknown, both to the Tribunal and to the party claiming revision, at the time of the judgement.

IV. The Applicant claims that the memorandum of 7 November 1989 was unknown to him and that, therefore, its discovery constitutes a new fact. The Tribunal has to decide whether this new fact meets the requirements of article 12 of its Statute.

V. In the view of the Tribunal, the non-transmittal of the memorandum of 7 November 1989 to the Applicant cannot be considered "a decisive factor", as required by article 12. The Tribunal need not enter into the question of whether a copy of the memorandum should have been made available to the Applicant. Even if there was an obligation to do so, the omission to communicate the document would only constitute a minor procedural flaw, having no bearing on the outcome of the case. The Applicant's defence was not impaired by the Applicant's ignorance of the memorandum. The circumstances mentioned in the memorandum as possibly attenuating some of the charges, i.e. the admission by the Resident Representative that he had delegated "[the Applicant] to sign short-term and fixed-term contracts" were before the Joint Disciplinary Committee and were consequently before the Tribunal when it rendered Judgement No. 563. It is thus perfectly clear, in the Tribunal's view, that article 12 cannot be invoked in this instance.

VI. As to the Applicant's allegation that the UNICEF Representative did not adhere to CF/AI/1990-05, the Tribunal also concludes that it does not constitute a new fact of a decisive nature warranting revision. As to the Applicant's contention that he was not duly informed of the possibilities opened to him by article 11 of the Tribunal's Statute, the Tribunal finds that the

Applicant was so informed in a letter dated 31 July 1992, from the Executive Secretary of the Tribunal.

VII. As regards the alleged implication of the phrase used by the Tribunal at the end of paragraph VI of Judgement No. 563, the Tribunal notes that it cannot be claimed, as the Applicant does, that the Tribunal was ignorant of the issues submitted to it. The text of Judgement No. 563 clearly shows that all the points raised by the Applicant were duly disposed of.

VIII. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Jerome ACKERMAN
First Vice-President, presiding

Luis de POSADAS MONTERO
Second Vice-President

Mayer GABAY
Member

New York, 4 November 1994

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/670
4 November 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 670

Case No. 729: ABDALA, ET AL

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Jerome Ackerman, Vice-President; Mr. Mikuin Leliel Balanda;

Whereas at the request of Ali Abdala, the President of the Tribunal, with the agreement of the Respondent, successively extended the time-limit for the filing of an application with the Tribunal, on behalf of himself and 79 similarly situated staff members, to 15 April 1993 and 31 May 1993;

Whereas, on 17 May 1993, the Applicants filed a joint application containing pleas which, inter alia, request the Tribunal:

> "6. ... to rescind the contested decision of 19 June 1991 by the Officer-in-Charge, Department of Administration and Management (...) insofar as it applies to the remuneration in Amman of the General Service staff members who had been internationally recruited for service in Baghdad, and to order the Secretary-General to enter into immediate consultations with ESCWA staff representatives with a view to finding an equitable and mutually acceptable solution to the problem (...)."
>
> and
>
> "Pending the conclusion of such consultations, ... to order that the applicants be restored to the status quo ante by being returned, with retroactive effect, to the Baghdad

General Service salary scale with payment to them of a daily subsistence allowance for the duration of their temporary assignment to Amman (...)."

and further

"to commend to the Secretary-General's attention the two alternative solutions indicated by the Chairman, ESCWA Staff council in his letter of 6 October 1991 to the Assistant Secretary-General for Human Resources Management (...), i.e., retention of the Baghdad salary scale with payment of a daily subsistence allowance in Amman, or the grant to the applicants of Field Service status, among other options (...)."

as well as

"7. to award to them legal costs in the amount of $5,000 (...)."

Whereas the Respondent filed his answer on 30 June 1994;

Whereas the Applicants filed written observations on 5 October 1994, including a plea for an enhanced termination package;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations Economic and Social Commission for Western Asia (ESCWA, formerly ECWA) at its Headquarters in Beirut on 7 July 1980. He was given a three-month fixed-term appointment as a Personnel Clerk at the G-4 level. He continued to serve on a succession of fixed-term appointments of varying duration. On 1 July 1982, the Applicant's duty station was changed to Baghdad, and he acquired "internationally recruited" status. On 29 April 1986, he was granted a probationary appointment, made permanent on 1 January 1987. In August 1990, the Applicant was temporarily repatriated from Baghdad. On 1 August 1991, his duty station was changed to Amman. Apart from the different dates of entry in service and of differences in grade, the other 79 Applicants have a similar

employment history. They are all General Service staff members, internationally recruited for service with ESCWA in Baghdad, and subsequently relocated to Amman in 1991.

In 1981, the Secretariat of ESCWA relocated from Beirut to Baghdad. The Applicants, who had been locally recruited for service in Beirut, were transferred to Baghdad with the status of internationally recruited staff. This entitled them to various allowances and benefits under staff rule 104.7(a).

In August 1990, as a result of the Persian Gulf conflict, ESCWA's operations were suspended and all internationally-recruited staff members in both the Professional and General Service categories were evacuated from Baghdad. After their evacuation, these staff members continued to receive the salary and emoluments calculated at the rate applicable to service in Baghdad. They also received a monthly evacuation allowance to compensate for the additional expenses incurred as a result of their evacuation.

In November 1990, a small liaison office was opened in Amman, Jordan. On 25 April 1991, the Director of the Buildings and Commercial Services Division, Office of General Services, in a memorandum to the Under-Secretary-General for Administration and Management, reported the finding of an investigative mission that it would be feasible to regroup 106 ESCWA staff in Amman. He noted that: "It is envisaged that the office in Amman will act as a bridge point or a holding area for ESCWA staff later going back to the Headquarters in Baghdad, Iraq," and he recommended that no locally recruited staff in Baghdad be transferred to Amman, unless on an exceptional basis "the required skills are not available among international GS [General Service] staff."

On 2 May 1991, the recommendations contained in the report of the mission were approved by the Under-Secretary-General for Administration and Management. On 19 June 1991, the Officer-in-Charge of the Department of Administration and Management advised the Executive Secretary of ESCWA, inter alia, as follows:

"...

(a) The regrouping in Amman should be initiated immediately with a view to having all staff in Amman by the end of August.

(b) It should not be confined to 106 staff members as initially envisaged but should apply to all internationally recruited staff.

...

2. This will be a temporary regrouping for an initial period of one year, i.e. until August 1992. ... These arrangements will also result in a change of duty station. The duty station for all ESCWA staff will be Amman and salaries and allowances will be adjusted accordingly.

..."

In a memorandum dated 17 July 1991, addressed to all ESCWA Professional and International General Service staff members, the Chief, Division of Administration, ESCWA, requested all staff concerned, to report in Amman by 11 August 1991, explaining that:

"The regrouping in Amman is for an initial period ending 31 August 1992. The regrouping will result in a change of duty station with consequent adjustments in emoluments and compensation package. ...

... [International General Service] staff members will be placed in Amman GS salary scale on basis of same numerical grade and step as that in Baghdad ..."

In response to this memorandum, on 17 July 1991, the ESCWA Staff Council wrote to the Chief, Division of Administration, protesting the decisions made in connection with the regrouping on salaries and conditions of service. It noted that it had not been consulted, formally or informally, before the issuance of the memorandum. It stated that the Amman conversion ratio set forth in the memorandum was "not in line" with the agreement reached between the Staff Council and the Administration, namely that "the Baghdad conversion ratio would also be applied for ESCWA International General Service staff members moving to Amman."

On 27 August 1991, the Chief, Division of Administration, ESCWA, advised the Deputy Controller, Department of Administration and Management, that "the salary scale applied in Amman is much lower than that of Baghdad approximately 1/3," and that the substantial difference in the exchange rate between Iraq and Jordan "has led to a considerable drop in net take home salary in terms of dollars."

On 11 September 1991, the Chief, Division of Administration, ESCWA, transmitted to Headquarters a number of recommendations from the ESCWA Joint Advisory Committee, seeking by various means, to compensate for the decrease in remuneration of international General Service staff members resulting from the change of duty station. Proposed measures included the reinstatement of a non-resident allowance, approval of a rental subsidy, an increase in the rate of conversion, and the conduct of a place-to-place survey with retroactive effect. In a further cable, dated 16 September 1991, he requested approval to compensate staff transferred to Amman for advance rent paid in Baghdad prior to the regrouping of ESCWA staff.

In a letter dated 6 October 1991, the Chairman of the ESCWA Staff Council wrote to the Assistant Secretary-General, Office for Human Resources Management (OHRM), with several proposals to address the situation of international General Service staff members in Amman. He recalled that these staff members had relocated from Beirut to Baghdad in 1982, having accepted a "package-offer" which was "meant for Baghdad," and that there had been no mention that they could "be moved from one duty station to another, and be subjected to the local salary scale of any duty station." He noted that the Organization was "cutting away two thirds of their take-home pay for the same job," and proposed that these staff members should either "be entitled to payment of salary and other allowances prevailing at the original duty station plus payment of the applicable DSA at the new duty station" or "be granted the Field Service Status", which was suited to their de facto circumstances.

On 25 October 1991, the Acting Under-Secretary-General, Department of Administration and Management, replied to the communications of 11 September and 16 September 1991 from the Executive Secretary of ESCWA, concerning the salaries and conditions of service of the ESCWA staff. He provided details of a number of special measures taken to alleviate the circumstances of the regrouped International General Service staff members, including the continued application of the currency distribution provisions which had been applicable in Baghdad to enable staff members to receive a higher proportion of their salary in US dollars. He also advised the Executive Secretary that locally recruited staff members in Baghdad could not be allowed to join the office in Amman in light of the risk that they might then have a claim to international status, and that therefore they should be offered agreed terminations "under the best terms and conditions allowed by the Staff Rules and Regulations."

On 2 November 1991, the Chairman of the ESCWA Staff Council again wrote to the Assistant Secretary-General, OHRM, concerning the "unbearable financial difficulties" faced by International General Service staff in Amman and recalling the option "to rescind the decision taken to consider Amman as the new duty station of this category of staff, since the regrouping of ESCWA in Amman is a temporary one." He also recalled the other options proposed, namely "mission assignment or, reclassification of the category concerned into Field Service."

On 26 December 1991, the Applicants wrote to the Secretary-General, requesting a review of the administrative decision to apply the General Service salary scale of Amman to the internationally recruited General Service ESCWA staff members who had been transferred from Baghdad.

On 26 March 1992, a cable from OHRM to ESCWA noted that the International Civil Service Commission (ICSC) had not been able to complete consideration of various proposals relating to the International General Service staff in Amman during its session and had postponed any decision until its next session in July 1992.

However, "mindful of particular circumstances faced by IGS [International General Service] staff of ESCWA", ESCWA was informed of the decision taken to introduce "ad hoc measures to remedy situation in Amman." Among these measures was the payment of a rental subsidy, effective 1 September 1991, with a waiver of the maximum reimbursement limit of 40 per cent, and the payment of a non-pensionable supplement equivalent to 10 per cent of net salaries. ESCWA was instructed "It should be clearly explained to all concerned that above ad hoc measures have been approved on exceptional and temporary basis ... application of these measures shall not be construed as acquired rights of staff."

On 29 April 1992, the Director, Staff Administration and Training Division, OHRM, informed the Applicants that the challenged decision would be maintained. The letter stated, inter alia:

> "Annex I to the Staff Regulations, provides that the Secretary-General shall fix the salary scales for staff members in the General Service category on the basis of the best prevailing conditions of employment in the locality of the United Nations office concerned ... The local salary scale, once promulgated, is applicable to all the General Service staff members at the duty station, whether their status is local or international. ..."

On 27 March 1992, the Applicants lodged an appeal with the Joint Appeals Board (JAB). On 20 August 1992, the JAB adopted its report. Its findings and recommendation read, in part, as follows:

> "55. ...
>
> (b) ... that the application of the Amman General Service salary scale to the [Applicants] upon their relocation from Baghdad to Amman did not violate their terms of employment.
>
> (c) ... that the decision to consult ECWA General Service staff on a package of incentives in connection with the transfer of ECWA from Beirut to Baghdad did not constitute a precedent applicable to the present case, as the surrounding circumstances were different.
>
> ...

(e) ... that the [Applicants'] request for the restoration of the status quo ante cannot be entertained in view of the above findings.

(f) ... that the views of the [Applicants] were taken into consideration when the Administration discussed and reviewed the various issues related to the [ESCWA] regrouping in Amman.

56. The Panel therefore unanimously decides to make no recommendation in support of the appeal."

On 15 October 1992, the Assistant Secretary-General for Human Resources Management informed the Applicants as follows:

"[t]he Secretary-General has re-examined your case in the light of the Board's report. He fully concurs with the Board's findings and notes with approval the Board's decision to make no recommendation in support of the appeal. ...

The Secretary-General has decided to take no further action on this appeal."

On 17 May 1993, the Applicants filed with the Tribunal the joint application referred to earlier.

Whereas the Applicants' principal contentions are:

1. General Service staff members who have been internationally recruited for service at a given duty station cannot legally be automatically transferred to another duty station. The change in duty station resulted in a financial loss on an order of magnitude of 70 per cent and extreme hardship to the Applicants.

2. There is no global salary scale for General Service staff members, as there is for Professional and Field Service staff. The unilateral reduction by the Administration of the Applicants' salaries by two thirds caused excessive harm to and discriminated against General Service staff members. It was unreasonable and constituted an abuse of authority.

3. There was inadequate consultation prior to the transfer from Baghdad to Amman, in violation of the precedent set by the

1981-1982 relocation of ECWA from Beirut to Baghdad, and in violation of staff regulation 8.1.

Whereas the Respondent's principal contentions are:

1. The application of the Amman salary scale to the Applicants is a necessary consequence of the decision to relocate the ESCWA Secretariat from Baghdad to Amman and of the resulting change of duty station. That decision was taken by the Secretary-General in the proper exercise of his discretionary authority.

2. The Applicants' plea that the Respondent negotiate a settlement of their claims is not a matter for adjudication.

The Tribunal, having deliberated from 12 October to 4 November 1994, now pronounces the following judgement:

I. The Applicants, internationally recruited General Service staff members, appeal from a decision of the Respondent dated 15 October 1992, in which the Respondent concurred with the findings of the JAB and approved its unanimous decision to make no recommendation in support of the Applicants' appeal. In their observations, the Applicants submit a new plea that the Respondent be ordered to make available to them an enhanced termination benefit package, similar to that extended to locally recruited General Service staff members of the Baghdad ESCWA office whose posts were abolished. As the Tribunal has held in other cases, the introduction of new pleas in written observations on the Respondent's answer is improper and they will not be entertained.

II. This case is somewhat related to the applications which were decided by the Tribunal in Judgement No. 590, Abdala, et al. (1993). That case involved essentially the same group of staff members and the discontinuance of rental subsidies with respect to their residences in Baghdad. As a result of the Persian Gulf conflict, the activities of ESCWA in Baghdad were temporarily suspended and

all internationally recruited staff, including the Applicants, were evacuated from Baghdad under temporary repatriation measures. They continued to receive their base salary and other elements of remuneration at the Baghdad rate, plus a monthly evacuation allowance to compensate for the additional expenses incurred as a result of their evacuation. In June 1991, it was decided to proceed with a temporary regrouping in Amman of all internationally recruited staff. The staff of ESCWA was advised that the regrouping would result in a change of duty station to Amman and that salaries and allowances were to be adjusted accordingly.

III. In mid-July 1991, internationally recruited General Service staff members were informed that they should report to Amman by 11 August 1991 and that the regrouping would be for an initial period, ending on 31 August 1992. It is in respect of that regrouping that the claims of the Applicants arise.

IV. Before the Tribunal can consider the appropriateness of any remedial action sought by the Applicants, it must determine, in keeping with article 2 of its Statute, whether there has been non-observance of the contracts of employment or terms of appointment of those staff members. The first issue is, therefore, whether the Respondent's assignment of the Applicants to the ESCWA Office in Amman, and the application to them of Amman salary scales constituted non-observance of their terms of employment.

V. By way of background, the Tribunal recalls that, before ESCWA moved from Beirut to Baghdad in 1981, as a result of unsettled conditions in Beirut, the Applicants were locally recruited General Service staff members of ESCWA. In connection with their transfer to Baghdad, they were given the status of internationally recruited staff which entitled them to various expatriate benefits under staff rule 104.7. These included a non-resident allowance, an ad hoc

rental subsidy (the subject of Judgement No. 590), an arrangement with regard to convertible currency, an educational benefit and an installation grant.

VI. After the regrouping in Amman and as a result of complaints by the Applicants about their salaries and conditions of service, special measures were taken by the Administration in an effort to provide additional assistance to them. In response to a request for reinstatement of a non-resident allowance, it was pointed out that the allowance had been subsumed under payment of a mobility and hardship allowance which was higher than the non-resident allowance and that, therefore, under the applicable rules, a non-resident allowance could not be paid. With respect to payment of a rental subsidy, the matter was initially deferred pending a recommendation from the ICSC. With respect to the currency of salary payments, an exception was made which permitted payment in Amman of the same percentage of net base salaries in U.S. dollars as had previously been applicable in Baghdad. As an exception, payment of an extended assignment allowance was approved, under specific case-by-case circumstances. A modification favourable to the staff was made in connection with previously approved reimbursement of rental expenses in Baghdad. A favourable termination arrangement was also approved for staff members upon expiration of their fixed-term appointments. In short, benefits similar to those which had been provided to General Service staff members in 1981, in connection with their transfer to Baghdad from Beirut, continued to be provided in connection with the regrouping in Amman. The main dissatisfaction, however, on the part of the Applicants stems from the fact that the General Service salary scales in Amman, which are based on salary levels in the Amman area, are significantly lower than the General Service salary scales in Baghdad.

VII. The Respondent argues and the JAB correctly found that staff regulation 1.2, which provides:

> "Staff members are subject to the authority of the Secretary General and to assignment by him to any of the activities or offices of the United Nations ..." (Emphasis added)

authorized him to transfer the internationally recruited Applicants from Baghdad to Amman in connection with the relocation of ESCWA. As indicated above, the Applicants' challenge to the authority of the Secretary-General regarding their assignment to Amman is essentially based on economic considerations. This is hardly a valid ground for attacking the Secretary-General's authority under staff regulation 1.2.

VIII. Nothing in the Staff Regulations or Rules provides support for the Applicants' contention that internationally recruited General Service staff can be assigned to Amman for a one year period only if they continue to be paid under the salary scale of Baghdad, plus a daily subsistence allowance. The Secretary-General has the authority to change the duty station, and when internationally recruited General Service staff are transferred to a new duty station, their salary is established in accordance with staff regulation 3.1, Annex I, paragraph 7 to the Staff Regulations, and staff rule 103.2[1/]. Under this regime, the Secretary General fixes the salary scales for staff members in the General Service category on the basis of the best prevailing conditions of employment in the duty station of the office concerned. To this end, surveys of local employers are conducted at each duty station. On the basis of the surveys, salary scales are established and are applied to all General Service staff in the locality. In addition, a system for interim adjustments to General Service salary scales is aimed at providing for cost-of-living changes at each duty station. See, Judgement No. 395, Oummih, et al. (1987).

[1/] There may, of course, be other differences in entitlements as between locally recruited and internationally recruited General Service staff such as those described in staff rule 104.7 and those exceptionally provided in this case to take account of special circumstances.

IX. Hence, a change of duty station may result in a change in net remuneration, but this may be a normal consequence of the methodology by which salary scales are determined. A somewhat analogous situation was before the Tribunal in Judgement No. 629, Clavel and Sallier (1993), in which General Service staff members who had been promoted from the General Service category to the Professional category subsequently experienced a reduction from what their net remuneration would have been had they remained in the General Service category. This resulted from a difference in the remuneration system as between the General Service and Professional categories. Their situation was, therefore, not brought about by non-observance of their contracts of employment and their requests for relief were rejected. See, also, ILOAT Judgement No. 1322, Anderson (1994). A change in duty station which leads to a reduction in remuneration, while regrettable, is not in itself a violation of the Applicants' terms of employment.

X. In such a situation, it is not the function of the Tribunal to substitute its judgement for that of the Respondent with regard to whether or how to deal with claimed adverse economic consequences such as those asserted by the Applicants as a result of their relocation. That, as the JAB concluded, is a matter for the Secretary-General's judgement. The Tribunal is unable to find that the Secretary-General has violated the Applicants' contracts of employment or terms of appointment.

XI. The Applicants contend that in order to induce them to move from Beirut to Baghdad, special benefits were offered by the Administration and they moved in reliance thereon. From this, they conclude that a precedent was established under which it was implicitly agreed that, before they were moved again, they would first be consulted and further arrangements agreeable to them would be made by the Respondent. The Tribunal notes that the Applicants were given the status of internationally recruited General Service staff with a package of special benefits, as described above, in

order to induce them to move from Beirut to Baghdad. The reason given was the anticipated unavailability of qualified persons in Baghdad for the posts in question. This concern does not appear to have been a factor in connection with the relocation to Amman. Hence, the situation was, as the JAB found, different.

XII. There is no evidence of any undertaking, express or implied, concerning any limitations on the authority of the Respondent under the Staff Regulations and Rules with regard to possible future relocation of the ESCWA office and/or the Applicants. The Staff Regulations and Rules make clear the nature of the Respondent's authority in those regards. It does not follow, therefore, that, because it was found necessary to provide inducements for the Applicants to transfer from Beirut to Baghdad, a precedent was established mandating that the Respondent either retain Baghdad salary scales or reach some further agreement with the Applicants as a condition of being able to assign them to a new duty station.

XIII. With respect to the Applicants' contention that the decision to transfer them to Amman was invalid because it was not preceded by consultations under staff regulation 8.1 and staff rules 108.1, et seq., the Tribunal agrees with the Respondent's contention that decisions as to the geographic location of the Secretariat or of any particular subsidiary organ of the United Nations, such as a Regional Commission, are not matters subject to mandatory consultations with staff representative bodies under these regulations and rules. Decisions relating thereto may involve diplomatic, political, financial, emergency and policy considerations. This does not mean, however, and the Respondent so concedes, that the effects on staff members of a relocation and related measures are not proper matters for consultation at an appropriate time. In the present case, the views of the staff with regard to measures for their benefit in connection with the

relocation were considered by the Respondent. He explained why it was not possible to grant all of the staff requests. Yet, as a result of the consideration given to the staff requests, some additional benefits were provided. Accordingly, the Tribunal finds no support for the Applicants' contention that either their relocation or its terms were invalid on account of non-compliance with any applicable staff regulation or rule relating to consultation.

XIV. The Tribunal recognizes that a degree of financial hardship is inevitably involved in the relocation of internationally recruited staff if the applicable Staff Rules cause a reduction in their net remuneration. The Respondent also recognizes that the alternative faced by the staff in such a situation requires difficult decisions. Here, the situation arose from external events - not because of any intent to impose hardship on the staff. On the contrary, in recognition of the need for equitable transitional arrangements, the Respondent made reasonable efforts to ameliorate the problems associated with relocation. The measures adopted were in keeping with the status of the Applicants as General Service staff, who were internationally recruited. But no internationally recruited General Service staff member can reasonably expect to be paid indefinitely at the salary scale of a former duty station. The Staff Regulations and Rules contemplate that locally recruited General Service staff members' appointments are ordinarily terminated if their posts are abolished due to relocation of the duty station. Internationally recruited General Service staff may be transferred and are entitled to international benefits, but their salaries are calculated on the basis of the scale for the duty station to which they are transferred.

XV. Accordingly, the Tribunal finds no reason to consider any of the remedial requests set forth in the pleas.

XVI. For the foregoing reasons, the application is rejected, as is the request for legal fees.

(Signatures)

Samar SEN
President

Jerome ACKERMAN
Vice-President

Mikuin Leliel BALANDA
Member

New York, 4 November 1994

B. Maria VICIEN-MILBURN
Executive Secretary

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AT/DEC/671
4 November 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 671

Case No. 731: GRINBLAT

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Jerome Ackerman, Vice-President; Mr. Francis Spain;

Whereas, on 19 May 1993, Joseph Alfred Grinblat, a staff member of the United Nations, filed an application with the Tribunal;

Whereas, on 3 December 1993, the Applicant amended his pleas to request the Tribunal:

> "7. To rescind the decision of the Secretary-General of 12 April 1993 (...), which was based on the recommendation of the Joint Appeals Board dated 7 April 1993 on an appeal of the Applicant who was requesting that his name be added to the short list prepared by the Appointment and Promotion Board for the Vacancy No. 92-M-ESA-210-NY, so that he could be considered in the selection for the post, or that, should it be too late, an appropriate compensation be given to him (...).
>
> 8. To decide, given that the selection for the post has already been implemented, that the Applicant shall be promoted to P-5 at the next opportunity.
>
> 9. To order that the Secretary-General shall pay to the Applicant an appropriate compensation for the damage resulting from having unjustly been excluded from

[consideration for] promotion [to] the post above-mentioned. This damage includes:

(a) A loss in salary ... [which] would cumulate to a little over 31,000 dollars by the time the Applicant would reach retirement age.

...

(c) The moral injury caused by the loss to the professional reputation of the Applicant, ...

..."

Whereas the Respondent filed his answer on 30 June 1994;

Whereas, on 8 August 1994, the Applicant filed written observations;

Whereas, on 11 October 1994, the Tribunal put questions to the Respondent, to which he provided answers on 14 October 1994;

Whereas the Applicant submitted comments on the Respondent's reply on 26 October 1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 30 July 1968, on a probationary contract at the P-1 level, as an Assistant Social Affairs Officer in the Department of Economic and Social Affairs, Population Division. He resigned from the Organization, with effect from 1 August 1969. On 2 November 1975, the Applicant re-entered the service of the Organization for the second time, on a two year fixed-term appointment at the P-3 level, as a Population Affairs Officer in the Department of Economic and Social Affairs, Population Division. His appointment was converted to probationary on 1 September 1977 and became permanent on 1 June 1978. On 1 July 1978, the Applicant was transferred to the Department of International Economic and Social Affairs (DIESA), Population Division, Population and Development Section. He was promoted to the P-4 level, with effect from 1 April 1981. On 1 January 1987, he was assigned to the Estimates and Projections Section of the Population Division.

On 30 December 1991, the Applicant applied for the P-5 post of Chief, Population Trends and Structure Section, Population Division, DIESA. Selection for the post was conducted under the Vacancy Management and Staff Redeployment System, in force at the time, established in accordance with the Secretary-General's bulletin ST/SGB/221 of 22 December 1986 and administrative instruction ST/AI/338 of the same date. Six internal and three external candidates applied for the post. Five internal candidates, two women and three men, including the Applicant, were found by the Department to meet all the requirements of the post. Their names were submitted to the Office of Human Resources Management (OHRM), which submitted them in turn to the Appointment and Promotion Board (APB).

On 7 May 1992, the APB established a provisional short list of two candidates for the post and noted that:

> " The Board found the above listed women highly qualified for the vacancy in question and at the same time took into account the Secretary-General's bulletin (ST/SGB/237) dated 18 March 1991 on the subject of the improvement of the status of women in the Secretariat."

On 11 May 1992, a Recruitment and Placement Officer, OHRM, informed the Applicant that his name had not been included in the provisional short list of candidates established by the APB. On 13 May 1992, the Applicant instituted a recourse against his non-inclusion in the short list. On 9 July 1992, the APB, having considered the recourse, submitted its final short list of two women candidates for the post. On 16 July 1992, the short list was forwarded by the Officer-in-Charge, Recruitment and Placement Division, OHRM, to the Under-Secretary-General, DIESA, for selection. Also on 16 July 1992, the Applicant was informed that his name had not been included in the final short list. On the same date, he wrote to the Secretary-General, requesting a review of the administrative decision not to short list his name for the post.

On 14 August 1992, the Director of the Population Division recommended a candidate from the short list for the post, noting her

"exceptional expertise and familiarity with the Section's subject matter and her potential leadership ability." On 25 August 1992, the Department notified OHRM that it had selected the recommended candidate.

On 18 August 1992, the Applicant filed a preliminary appeal with the Joint Appeals Board (JAB) and requested "a suspension of action on the short list". On 26 August 1992, the JAB adopted its report on the request for suspension of action which reads, in part, as follows:

> "16. It is the unanimous finding of the Panel that the relief requested is appropriate in light of the facts presented and the serious allegations made, which dictate a more intensive investigation, and that a suspension of action should be granted pending the decision on the appeal since the implementation of the action would directly and irreparably injure the Appellant."

On 4 September 1992, the Assistant Secretary-General for Human Resources Management transmitted the JAB report to the Applicant and informed him, inter alia, as follows:

> "The Secretary-General has re-examined your request in the light of the Board's report. He has especially been mindful of the following circumstances and considerations:
>
> (a) that the appeal is against the recommendation by an advisory body to the Secretary-General, the Appointment and Promotion Board, of a short list of candidates which was established after that body had thoroughly considered your recourse;
>
> (b) that such recommendation is not an administrative decision within the meaning of staff rule 111.2(a) and (f); even if it were to be regarded as such, it could not be stayed since a final decision on the matter was made prior to receipt of the Board's report by the Secretary-General.
>
> This shows a completed administrative action. The Secretary-General has decided to take no action on your request."

On 27 August 1992, the Applicant submitted his statement of appeal on the merits to the JAB. The JAB adopted its report on

7 April 1993. Its considerations, conclusions and recommendations read, in part, as follows:

> "33. The Panel first examined the selection process which led to the contested decision ... After reviewing all the steps ..., the Panel concluded that the provisions of administrative instruction ST/AI/338 and Add.1 to 6 had been duly applied.
>
> ...
>
> 35. The Panel also considered very carefully the Appellant's contention that 'the Appointment and Promotion Board made no comparison of the merits of the two short-listed women versus [his own] qualifications'... The Panel was perfectly aware of the fact that it could not substitute its judgement for that of the Appellant's department, OHRM and the Appointment and Promotion Board in making an evaluation or a comparison of the merits of applicants for the post. It therefore limited its examination to the Appellant's contention that his name was not short-listed because the Board knew that he was better qualified than the two selected staff members. It reviewed very carefully the files of the case and was unable to find any evidence in support thereof.
>
> 36. Regarding ... [Appellant's claim that the contested decision disregarded in particular the requirement for 'equality of opportunity for all staff in the Secretariat'], the Panel ... concluded that the Secretary-General acted in compliance with Article 8 of the Charter, the relevant resolutions of the General Assembly and the Convention on the Elimination of All Forms of Discrimination Against Women in issuing bulletin ST/SGB/237 to improve the status of women in the Secretariat.
>
> 37. ..., the Panel was of the view that the Appointment and Promotion Board acted within its mandate and in full compliance with the relevant provisions of the Charter, the Staff Rules and Regulations and the Secretary-General's relevant administrative instructions, in short-listing only two female candidates for the vacancy to be filled.
>
> 38. The Panel unanimously:
>
> Finds that the contested decision does not disregard the requirement of 'equality of opportunity for all staff in the Secretariat'.
>
> Concludes that the decision not to short-list the Appellant did not constitute non-observance of his terms of appointment or of any pertinent regulations or rules.

39. The Panel unanimously recommends that the appeal be rejected."

On 12 April 1993, the Under-Secretary-General for Administration and Management transmitted the JAB report to the Applicant and informed him, inter alia, as follows:

"The Secretary-General has re-examined your case in the light of the Board's report. He has decided, in accordance with the Board's unanimous recommendation, to reject your appeal."

On 19 May 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant is more qualified than either of the two female candidates short-listed for the post, and the decision not to short-list him was motivated by prejudice against his gender, violating Article 8 of the Charter and General Assembly resolutions 44/185 C and 45/239 C.

2. The decision not to short-list the Applicant violated administrative rules and regulations in that:

(a) The APB applied the Secretary-General's promotion policy set forth in ST/SGB/237, which is not applicable to short-listing;

(b) The short-listing of only two candidates violated administrative instruction ST/AI/338/Add.5, paragraph 10, which provides that short lists should normally contain at least three names; and

(c) The APB made no comparison of the merits of the Applicant versus the merits of those short-listed candidates as mandated by administrative instruction ST/AI/338/Add.5, which provides that "the best qualified" shall be short-listed.

3. The instructions in the Secretary-General's bulletin ST/SGB/237 contravene General Assembly resolutions 44/185 C and

45/239 C as they allow the promotion of candidates who are not necessarily the best qualified.

4. The policy of the Secretary-General regarding promotion of women in the Secretariat is based on the false premise that there has been discrimination against women with respect to promotions.

Whereas the Respondent's principal contentions are:

1. The special measures promulgated by the Secretary-General sought to implement Article 8 of the Charter and are in line with the subsequent General Assembly resolutions 44/185 C and 45/239 C.

2. The Secretary-General's instructions gave effect to the mandatory requirements of General Assembly resolutions 44/185 C and 45/239 C without losing sight of considerations of merit, efficiency, competence and integrity.

3. The short-listing of two candidates was within the margin of discretion of the APB.

4. The unequal representation of women in the Secretariat is an Assembly determination of fact.

The Tribunal, having deliberated from 11 October to 4 November 1994, now pronounces the following judgement:

I. The Applicant asks that the Tribunal rescind the decision of the Respondent dated 12 April 1993, which accepted a Joint Appeals Board recommendation, unfavourable to the Applicant, dated 7 April 1993. Alternatively, the Applicant asks that, since the selection to fill the P-5 post for which he had applied has already been made, he be promoted to the P-5 level at the next opportunity. He also claims compensation for injury he suffered by the omission of his name from the short list.

II. There were nine applicants for the post in question, three of whom were external candidates. Five of the candidates, including the Applicant, were found by the Office of Human Resources

Management to meet the requirements of the post and their names were accordingly submitted to the Appointment and Promotion Board (APB). Two were women. The APB established a provisional short list with the names of only the two women candidates. In commenting on this, the APB stated:

> "The Board found the above listed women highly qualified for the vacancy in question and at the same time took into account the Secretary-General's bulletin (ST/SGB/237) dated 18 March 1991 on the subject of the improvement of the status of women in the Secretariat."

III. Following notification to the Applicant that he had not been included in the provisional short list, he availed himself of the recourse procedure. He was subsequently notified that he had not been included in the final list. The Applicant asserts that his non-inclusion was solely due to preferential treatment given by the APB to the two women candidates and that, in fact, he was better qualified than either. In keeping with its jurisprudence, the Tribunal will not enter into appraisal of the relative qualifications of the candidates. Instead, as explained below, the Tribunal will examine (1) whether the APB went beyond its assigned areas of responsibility under the Vacancy Management System (VMS) in taking ST/SGB/237 into account as it did, and (2) whether its actions were in keeping with resolutions of the General Assembly, and Article 101(3) of the Charter.

IV. The Tribunal notes that the APB, in commenting on its short list, did not state that the women listed were the candidates best qualified for the vacancy. The APB's words were that the women listed were "highly qualified for the vacancy". These words do not rule out the possibility that other candidates found by the Department to meet the requirements of the post were equally qualified.

V. Because of the ambiguity in the comments of the APB accompanying the short list, the Tribunal requested information as

to the manner in which ST/SGB/237 was taken into account and the nature of the consideration it gave to the other candidates. The information received by the Tribunal discloses that the APB found the qualifications of all of the candidates whose names were submitted to it to be substantially equal. Yet, relying on the language of ST/SGB/237 requiring the promotion of women candidates solely on the basis of gender if they met the requirements of the vacant post, the APB omitted the names of equally qualified males from the short list. The Tribunal must, therefore, consider whether, under ST/AI/338/Add.5 on Vacancy Management and Staff Redeployment Provisional Guidelines for Implementation, it was appropriate for the APB to issue its short list based on ST/SGB/237, and the extent, if any, to which the latter may be implemented under the Charter and relevant resolutions of the General Assembly.

VI. Under the express language of ST/AI/338, and consistent with Article 101(3) of Chapter XV of the Charter, the APB, in preparing a short list, is to determine who among the applicants are best qualified. Normally, as provided in ST/AI/338, a short list should contain the names of at least three candidates, assuming, of course, that no fewer than three are qualified. If, among the qualified candidates being considered by the APB, only two are considered to be best qualified because the gulf between them and the others is substantial, the APB may quite properly submit a short list containing the names of only those two. On the other hand, if three or more candidates have equal qualifications, a reasonable reading of the language of the administrative instruction would mandate their inclusion on the short list.

VII. The APB took into account the part of ST/SGB/237, of 18 March 1991, which states:

> "... the following policy shall apply in the area of assignment and promotion:

> In departments and offices with less than 35 per cent women overall, and in those with less than 25 per cent women at levels P-5 and above, vacancies overall and in the latter group, respectively, shall be filled, when there are one or more female candidates whose qualifications match all the requirements for a vacant post, by one of these female candidates."

This, the Respondent argues, is a different and lower standard than one calling for candidates "best qualified" to fill a vacancy, and the Respondent also argues that it represents a lawful affirmative action measure for the improvement of the status of women. In the Respondent's view, ST/SGB/237 permits the APB to exclude from a short list men whose qualifications are equal to those of qualified women.

VIII. With regard to ST/SGB/237, the Tribunal considers that its policies, to the extent that they are authorized by the Charter and the General Assembly, may be implemented by an APB in accordance with the functions of the APB specified in ST/AI/338 and its addenda. That administrative instruction defines the role of the APB and has the same effect as a staff rule.

IX. The Tribunal notes that with respect to the submission of short lists under ST/AI/338 and its addenda, the functions of the APB include in relation to the improvement of the status of women, identifying and recommending women who have the potential for taking on work of greater scope and complexity. (See ST/AI/338, Add. 5, dated 2 November 1988, para. 14(g)). In addition, special guidelines were provided relating to seniority. (Id., para. 14(f) and Annex II). However, nothing in ST/AI/338 and its addenda, instructs or authorizes the APB to implement a policy of excluding equally qualified male candidates from a short list in order to ensure that only females can be considered for promotion to a vacant post.

X. ST/SGB/237 was issued in response to the Fifth Report of the Steering Committee for the Improvement of the Status of Women in the Secretariat. This report recommended various specific measures thought to be in keeping with the requests in General Assembly resolutions for continued improvement of the status of women in the Secretariat. The Respondent argues that, as can be seen from the ST/SGB/237 promotion policy, in certain cases, female candidates should be promoted if their qualifications meet all the requirements for a vacant post, without regard to better qualified candidates.

XI. The General Assembly adopted various resolutions for Improvement of the status of women in the Secretariat. These have been cited by the Respondent in support of the validity of a reduced standard for promotion for women as specified in the Secretary-General's bulletin. In its resolution 44/185 of 19 December 1989, the General Assembly, after recalling Articles 8 and 101 of the Charter:

> "Urges the Secretary-General to strengthen his efforts to increase the number of women in posts subject to geographical distribution, in particular at the senior and policy-formulating levels, with a view to achieving to the extent possible an overall participation rate of 30 per cent of the total by 1990, taking into account the principle that the paramount consideration shall be the necessity of securing the highest standards of efficiency, competence and integrity and with full respect for the principle of equitable geographical distribution." (Emphasis added)

XII. General Assembly resolution 45/239 on Improvement of the status of women in the Secretariat, dated 21 December 1990, begins by:

> "Reaffirming that the United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs ..." (Emphasis added),

and recalling Article 101 of the Charter, the resolution then:

> "2. Urges the Secretary-General to continue his efforts to increase the number of women in posts subject to geographical distribution, particularly in senior policy-level and decision-making posts, in order to achieve an overall participation rate of 30 per cent by the end of 1990 and, to the extent possible to 35 per cent by 1995, taking into account the principle that the paramount consideration shall be the necessity of securing the highest standards of efficiency, competence and integrity with full respect for the principle of equitable geographical distribution." (Emphasis added)

XIII. General Assembly resolution 46/100 on Improvement of the status of women in the Secretariat, dated 16 December 1991, after recalling Article 101 and referring to Article 8 of the Charter providing for equal eligibility of men and women, in paragraph 1:

> "Urges the Secretary-General, in accordance with the Charter of the United Nations, to accord greater priority to the recruitment and promotion of women in posts subject to geographical distribution, particularly in senior policy-level and decision-making posts, in order to achieve the goals set in resolutions 45/125 and 45/239 C of an overall participation rate of 35 per cent by 1995 and, to the extent possible, 25 per cent in posts at the D-1 level and above by 1995." (Emphasis added)

XIV. In each of the foregoing General Assembly resolutions, which had been adopted before the action of the APB in this case, and which are cited by the Respondent in support of his position, the improvements in the status of women being urged through affirmative action measures were related to the principle of equal treatment for men and women, and were subject to the criterion of securing the highest standards of efficiency, competence and integrity. This criterion was specifically referred to as part of the affirmative action goals in the 1989 and 1990 resolutions and, by reasonable inference, could hardly have been intended to be excluded from application of the 1991 resolution.

XV. It follows that when the APB issued the short list, based on the Secretary-General's bulletin, dated 18 March 1991, this was not in conformity with either the 1989 and 1990 General Assembly

resolutions, or with the subsequent 1991 General Assembly resolution, to the extent that the bulletin was interpreted as purporting to authorize the promotion of candidates solely on the basis of gender if they merely met the requirements of the vacant post without regard to whether there were better qualified candidates for the post.

XVI. In Judgement No. 507, Fayache (1991), paragraph VIII, the Tribunal noted that an averaging technique with respect to seniority that increased the number of female candidates who might be considered for promotion to higher level posts did not purport to authorize the promotion of females whose relative qualifications or merit were lower than male collaterals and therefore was in conformity with Article 101(3) of the Charter. But that is not the situation here, as argued by the Respondent.

XVII. The Tribunal recognizes that the various resolutions for Improvement of the status of women in the Secretariat which have been referred to and statements of the Secretary-General have conceded the existence of an unsatisfactory history with respect to the recruitment and promotion of women that does not accord with Article 8 of the Charter. In such circumstances, the Tribunal considers that Article 8 of the Charter must be regarded as a source of authority for reasonable efforts to improve the status of women. It would be anomalous indeed if this unsatisfactory history had to remain unremedied for an unduly long period. Unless affirmative action measures are taken towards ameliorating the effects of this past history, they will, without doubt, be perpetuated for many years. This is incompatible with the objectives of Article 8, as recognized by the General Assembly. Hence, the Tribunal concludes that Article 8 permits the adoption of reasonable affirmative action measures for improvement of the status of women.

XVIII. In evaluating the reasonableness of affirmative action measures, pertinent provisions of the Charter may not be ignored.

The Tribunal considers that, with respect to affirmative action measures, it would be impermissible to view Article 8 of the Charter as overriding Article 101(3), which states:

> "The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity ..."

This language unequivocally establishes a standard under which less qualified persons are not entitled to preferential treatment based on gender. The fundamental principle reflected in Article 101(3) may not be diluted by a desire, however commendable, to overcome past problems.

XIX. Even so, there is room for affirmative action. The Tribunal considers that, as long as affirmative action is required to redress the gender imbalance with which the Secretary-General and the General Assembly have been concerned, Article 8 of the Charter would permit, as a reasonable measure, preferential treatment to women candidates where their qualifications are substantially equal to the qualifications of competing male candidates; obviously such a preference is not needed if a woman's qualifications are superior. However, the APB concluded, in this case, that the Applicant's qualifications were equal to those of the short-listed candidates. It should, therefore, have included, in the short list, the Applicant and the others who were equally qualified. It would then have been for the Department to appraise the candidates and make the selection. In doing so, if it also considered the short listed candidates equally qualified, it would presumably then take affirmative action goals into account. In this instance, the APB, misconceiving its role under ST/AI/338, substituted its judgement for that of the Department, and thus prevented the Department from considering all the candidates found by the APB to be equally qualified. The Applicant's rights were, therefore, not fully respected and the responsibility of the Organization is engaged.

XX. The Tribunal does not consider that, in the circumstances of this case, particularly given that all the male candidates were deemed equally qualified by the APB and that the VMS is no longer in effect, it would be appropriate to rescind the Respondent's decision against adding the Applicant's name to the short list and order a new selection procedure for the post. The post has been filled for more than two years by the successful candidate. Furthermore, it would not be appropriate for the Tribunal to order that the Applicant be promoted to the P-5 level at the next opportunity. It is far from certain that, if the Applicant's name had been on the short list, he or any other male candidate would have been selected and ultimately promoted. It is not for the Tribunal to make such a judgement. For these reasons, the Tribunal will not order the payment of compensation to the Applicant premised on the notion that he would have been promoted had he been short-listed. However, it is appropriate for the Tribunal to order the payment of compensation to the Applicant for the infringement of his right to fair consideration by the APB. This the Tribunal fixes at US$2,000.

XXI. For the foregoing reasons, the Tribunal orders:

1. The Respondent to pay the Applicant US$2,000.
2. All other pleas are rejected.

(Signatures)

Samar SEN
President

Jerome ACKERMAN
Vice-President

Francis SPAIN
Member

New York, 4 November 1994

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/672
4 November 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 672

Case No. 635: BURTIS

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Mikuin Leliel Balanda; Mr. Mayer Gabay;

Whereas, on 12 August 1993, Farida Ghani Burtis, a former staff member of the United Nations, filed an application in which she requested, in accordance with article 12 of the Statute of the Tribunal, the revision of Judgement No. 575, rendered by the Tribunal on 13 November 1992;

Whereas the Respondent filed his answer on 10 September 1993;

Whereas the Applicant filed written observations on 30 September 1993;

Whereas, on 28 October 1993, the Respondent filed an additional statement;

Whereas on 11 November 1993, the Applicant submitted an additional statement;

Whereas, on 10 October 1994, the Applicant submitted an additional statement, together with additional documents;

Whereas, on 18 October 1994, the presiding member of the panel ruled that no oral proceedings would be held in the case;

Whereas the facts in the case have been set forth in Judgement No. 575.

Whereas the Applicant's principal contentions are:

1. Judgement No. 575 characterizes the Applicant's claims inaccurately. She did not claim that she was not appointed because of adverse information in her official status file, but that falsified information, inserted without her knowledge in other files, was considered in connection with her candidature.

2. The Applicant has new information in the form of a tape recording, in which UN officials admit to a deliberate falsification of the Applicant's official UN record in order to prevent her from being offered the post for which she applied.

Whereas the Respondent's principal contentions are:

1. The legal framework for revision of Tribunal judgements is restrictively defined by article 12 of the Tribunal's Statute.

2. The Applicant discloses no basis for the revision of Judgement No. 575, pursuant to article 12 of the Tribunal's Statute.

The Tribunal, having deliberated from 19 October to 4 November 1994, now pronounces the following judgement:

I. The Applicant requests, pursuant to article 12 of the Statute of the Administrative Tribunal, revision of Judgement No. 575. In that judgement, the Tribunal held that it was not competent to receive the application, as the claims and the status of the Applicant fell outside the scope of the Tribunal's jurisdiction, as defined in article 2 of its Statute. The Tribunal finds that the Applicant does not have standing to bring a claim pursuant to the requirements of article 2 of its Statute.

II. The Tribunal finds nothing in the Applicant's request which could justify a revision of the previous decision. The Tribunal

finds that the Applicant does not allege any new facts of such a nature as to be a decisive factor warranting a revision of the judgement, under article 12 of the Tribunal's Statute. Nevertheless, in view of the importance of some of the issues raised by the Applicant, the Tribunal wishes to offer the following comments.

III. Article 12 provides as follows:

> "The Secretary-General or the applicant may apply to the Tribunal for a revision of a judgement on the basis of the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence. The application must be made within thirty days of the discovery of the fact and within one year of the date of the judgement. Clerical or arithmetical mistakes in judgements, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Tribunal either of its own motion or on the application of any of the parties." (Emphasis added)

In order to avail herself of the remedy found in article 12, the Applicant had to satisfy certain conditions. Firstly, she had to demonstrate that the decisive fact on which she is basing her appeal was unknown to her at the time Judgement No. 575 was given. Secondly, the application for revision must be made within thirty days of the discovery of the fact the Applicant is alleging and within one year of the date of the judgement.

IV. It appears from the application that the fact on which the Applicant relies, to entitle her to revision under article 12, is that the members of the Administrative Tribunal who rendered Judgement No. 575 may not have known that they "put their signatures on a judgement in which Applicant's claims have been misrepresented ..."

The Tribunal is of the view that the Applicant has not proven to the Tribunal's satisfaction that her claims were misrepresented. The Tribunal has consistently held that the burden of proof rests upon the party making a positive affirmation, which in this case the Applicant has failed to discharge.

V. The Applicant also claims that she has "additional material of a decisive nature, which was not obtainable at the time the judgement was given". The material consists of "a tape in which UN officials admit to a deliberate falsification of [the] Applicant's official UN record, so that someone else may get the position". She requests that she be given an opportunity, during an oral hearing, to play this tape.

Having reviewed the application dated 15 November 1991, filed by the Applicant to institute the proceedings which led to Judgement No. 575, the Tribunal notes that the Applicant had the tape in her possession at that time. The fact that she chose not to submit it to the Tribunal then, warrants denial of her request to re-open the case under article 12, which makes it clear that facts known to a party before the judgement are not a ground for revision. This is fully in accord with the normal judicial doctrine of res judicata.

VI. The second condition that must be satisfied to fulfil the requirements of article 12 is a procedural one: the application for revision must be made within thirty days of the discovery of the fact and within one year of the date of the judgement. In other words, once the decisive fact is discovered, the Applicant must file the application for revision within 30 days thereof. In addition, this can be done only within one year following the date of the judgement in question.

VII. The Tribunal has already noted that the discovery of the tape was made prior to 15 November 1991, the date of the initial application. The Applicant thus failed to satisfy the first part of the condition. With respect to the second part of the condition,

the Tribunal would agree with the Applicant's contention that the date of Judgement No. 575 is 13 November 1992 and that she was within the one year time-limit, notwithstanding the fact that her application pursuant to article 11 was rejected on 16 July 1993, by the Committee on Application for Review of Tribunal Judgements.

VIII. Based on the foregoing considerations, the Tribunal concludes that even if she had standing, the Applicant would not have met the necessary conditions to obtain a revision of Judgement No. 575 pursuant to article 12.

IX. For the foregoing reasons, the application is dismissed in its entirety.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Mikuin Leliel BALANDA
Member

Mayer GABAY
Member

New York, 4 November 1994

R. Maria VICIEN-MILBURN
Executive Secretary

* * *

SEPARATE OPINION BY MR. LUIS DE POSADAS MONTERO

I have signed the present judgement only on account of its negative outcome. My opinion is, that the Tribunal, after having ascertained that the new facts submitted by Ms. Burtis in no way altered her status, should have added no further considerations to its judgement.

The Tribunal found in Judgement No. 575 that Ms. Burtis, according to article 2.2 of its Statute had no standing to come before it. The only new fact that could warrant a revision of such a conclusion would be one that would invalidate it by demonstrating that Ms. Burtis could be admitted as a party before the Tribunal. This has not been the case; the new facts submitted by Ms. Burtis do not give her standing before the Tribunal. Therefore, in my opinion, the Tribunal should have rejected Ms. Burtis' allegations *in limine* on the grounds of her lack of standing without addressing itself to the question of whether the requirements of article 12 of the Statute had been met.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

New York, 4 November 1994

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/673
4 November 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 673

Case No. 730: HOSSAIN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas, on 2 May 1993, S.M. Taifur Hossain, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), filed an application containing pleas which, in part, request the Tribunal to:

"...

(b) Rescind the separation order from the Executive Director UNICEF (DOP/PPSS/NR/92-165 dated 29 December 1992) ...

(c) [Order the] retroactive reinstatement as an International Professional Officer with all benefits without any prejudice ... [and] removal of all papers related to this case from my personal file.

(d) [Award] ... the legal costs ... for taking my counsel from India to Dhaka. ... approximately US$10,000. Additionally ... US$100,000 as compensation for psychological trauma to myself and family and loss of face ...

..."

Whereas the Respondent filed his answer on 8 June 1994;

Whereas the Respondent filed his answer on 8 June 1994;

Whereas, on 12 October 1994, the Applicant filed written observations;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF in Dhaka, Bangladesh on 1 April 1973, on a three month fixed-term appointment as a Field Assistant at the GS-5 level. His appointment was successively extended, and on 7 September 1974, the Applicant was transferred to the Jessore Field Office. On 1 January 1975, his title was changed to District Representative, and on 1 April 1975, he was promoted to the G-6 level. On 2 November 1977, the Applicant was transferred back to Dhaka and his title was changed to Programme Assistant. On 1 April 1978, he was promoted to the National Officer (NO) level A, and his title was changed to Assistant Programme Officer, Education Section. On 1 January 1981, his appointment was converted to probationary and became permanent with effect from 1 July 1981. On 1 January 1984, the Applicant was promoted to the NO-B level, and on 1 January 1986, to the NO-C level as Programme Officer.

On 17 March 1992, the Chief, Education Section, of the UNICEF Office in Dhaka informed the Chief, Operations Section, that some television (TV) sets procured by UNICEF for distribution to government counterparts had left UNICEF premises but had not reached their destination. She requested that the matter be investigated. On 2 April 1992, an Investigation Committee was appointed "to carry out further investigation into the possible lapse in the distribution of UNICEF's supplied Audio-Visual equipment". The Investigation Committee examined all relevant documentation, reviewed procurement procedures and the issuance of gate passes, and undertook further in-house investigations. The Committee also visited Government and Non-Governmental Organization representatives.

On 22 April 1992, the Investigation Committee submitted its report to the UNICEF Representative in Bangladesh. It found that of 51 TV sets, 8 were not accounted for in accordance with gate passes for them. Two were assumed to be those found in the Education Section, leaving 6 sets unaccounted for. Of 68 video-cassette recorders, 6 were missing. All gate passes relating to missing equipment were authorized by the Applicant, almost all during the absence of the Chief of the Section. These gate passes were - nearly all - requested by the Assistant Programme Officer, although, on occasion, the Applicant both requested and authorized the gate passes. The report concluded, "it is obvious that [the Applicant] ... and [the] Assistant Programme Officer ... are major staff involved in fraudulent activities which led to the unaccounted six (6) TVs, six (6) VCRs and other related supply and equipment."

On 18 May 1992, the Senior Operations Officer of UNICEF Dhaka and the Chief, Supply Section, UNICEF New Delhi, held an unannounced meeting with the Applicant in Hyderabad (India) to confront him with the findings of the investigation and to invite him to resign from UNICEF and make restitution for the losses involved, or alternatively to request him to prepare a response. The Chief, Field Office, Hyderabad, attended part of the meeting. The Applicant was requested to make a decision on these options within two hours. His request to call the UNICEF Dhaka Office was denied. After a short break in the meeting to consider his options, the Applicant submitted a handwritten resignation which read, "... I offer myself to resign on moral grounds and my responsibility as approving officer." At the meeting, the Applicant was given a letter dated 19 May 1992 from the Representative in Bangladesh which stated, inter alia:

> "We have offered you the option to resign on condition that you restitute fully to UNICEF the value of these items. You chose to decline this offer. You have 14 days from this date, i.e., up to close of business on 2 June 1992, to respond to the charges of misconduct as outlined in this letter, following which we will submit the case to the Executive Director for a decision ...

Effective today, you are suspended from duty with full pay ..."

On 19 May 1992, the Applicant wrote to the UNICEF Representative, India Office, to withdraw his resignation. His letter reads as follows:

"You are aware that ... and ... paid a visit to our Hyderabad Office on 18 May 1992 to acquaint with the outcome of an internal investigation in the Education Section in Dhaka. It was depressing to me that a person with integrity working more than 17 years was harassed on grounds of misappropriation of six TVs/VCRs. The investigation was carried out in my absence and upon my departure from Dhaka, may be with some vested interest. I was not given adequate opportunity for any sort of clarification or was allowed to call Dhaka Office.

A letter of suspension was shown to me signed by ... who is not my supervisor at present and I was offered two options to accept without any staff representative or a counsellor. The options were:

(1) Resign by 1500 hrs of 18 May 1992 and I can restore all my entitlements, or

(2) I can call for an investigation by 2 June 1992 and I miss all my benefits.

I called Dhaka and found out most of the items have been traced in the Section. There may be some anomalies in the system for which some corrective steps should have been advised to me by my previous supervisor.

I like to mention that I was forced to resign under psychological pressure from ... which was created during two hours one-sided deliberations.

Keeping the above in mind, I like to withdraw my forced upon resignation and request you to look into the situation once again."

On 21 May 1992, the Applicant wrote another letter to the UNICEF Representative, India, discussing the allegations against him and concluding:

> "... [I] gave in writing my offer to resign under great stress and agony for fear of being deprived benefits as [I] am a person from a third world country. Later realizing that [I] have the right to defend my case, [I] have promptly withdrawn my offer to resign in my fax to you of 19 May.
>
> ..."

On 22 May 1992, the Applicant wrote to the Director, Division of Personnel, requesting that appropriate action be taken "to restore [his] staffship." In a reply dated 1 June 1992, the Director, Division of Personnel, informed the Applicant: "we exceptionally agree to disregard your resignation, in view of the seriousness of your allegation and for the purpose of ensuring that justice is fully served". He requested the Applicant to submit his response within two weeks of receipt of the relevant documents on the case.

On 25 June 1992, after a visit with his counsel to Dhaka for meetings with UNICEF staff members and Government officials, the Applicant submitted his response to the charges of misconduct, which reads, in part, as follows:

> "... The Committee apparently overlooked the fact that after my departure from Dhaka, Education Section was reorganized. During the reorganization [a] lot of equipment was moved and possibility of misplacing can not be simply discounted. This is evident from the fact that 2 VCRs, 1 TV and 1 Stabilizer were located in the section around 18/19 May 1992. Information like discovery of more equipment in the section subsequently was not shared with me.
>
> ...
>
> On going through documents you will notice that I have responded fully to each and every allegation made against me. I HAVE PROVED THAT THERE WAS NO MISCONDUCT OR MISAPPROPRIATION OF ANY EQUIPMENT ON MY PART."

On 30 June 1992, the Investigation Committee submitted comments to the UNICEF Representative, Dhaka, on the Applicant's response to the allegations and reconfirmed its original conclusion that the Applicant and the Assistant Programme Officer had "misused

UNICEF property." On 13 July 1992, the UNICEF Representative, Dhaka, transmitted the report of the Investigation Committee, together with related documentation, to the Director, Division of Personnel, stating inter alia:

> "Two TVs are missing and the whereabouts of these are not addressed in [the Applicant's] response;
>
> Two gate passes signed by [the Applicant] were issued in the name of persons not employed by the Ministry of Education (...);
>
> One TV and two VCRs reappeared in the UNICEF Education Section and three TVs and one VCR in the Ministry of Education stores after ... and ... were presented with the allegations; and
>
> There are several inconsistencies in the reply of [the Applicant].
>
> I recommend that UNICEF take this matter most seriously and separate the staff member on the grounds of a breach of our basic standards of management and conduct."

A Joint Disciplinary Committee (JDC) was established on 23 August 1992. On 22 October 1992, it submitted its report to UNICEF Headquarters containing the following summary of its conclusions:

> "In summary the JDC states that there was loss of value to UNICEF, and that some compromise of UNICEF/GOB [Government of Bangladesh] relations ensued and this was a result of pre-conceived acts. There is however, no evidence to suggest it was consciously intended to defraud the organization but was rather a knowing and wilful approval for misappropriation and misuse of UNICEF equipment, most probably by Senior Government officials."

The JDC made the following recommendation in paragraph 6 of its report:

> "JDC recommends that given the nature of the wrong doing, that the S/M [staff member] be demoted, and two members (...) of the JDC believe he should not be considered for promotion nor for management responsibility for a considerable period in the future, (say 7-10 years)."

By letter dated 29 December 1992, the Applicant was notified of his dismissal for misconduct, with effect from two weeks after the date of its receipt. The letter read, in part, as follows:

> "... The main points of the JDC's findings are highlighted below:
>
> - that you breached UNICEF rules by issuing gate passes, in two separate instances, in fictitious names, and that you knowingly approved the misappropriation of equipment, although not for your own personal material gain;
>
> - that you knowingly broke basic rules of conduct and procedure of UNICEF, specifically by authorizing irregular activities on at least two occasions.
>
> - that you contributed to jeopardizing relations between the Government of Bangladesh and UNICEF;
>
> - that you are held responsible and accountable for one missing TV set.
>
> ...
>
> The JDC recommended to take disciplinary measures against you, in the form of a demotion. Additionally, two members recommended that you not be considered for promotion nor for management responsibility for a considerable period in the future.
>
> Having considered all the facts and findings, ... the Executive Director has concluded that your actions indicate a clear pattern of abuse of UNICEF's rules and regulations. The Organization views very seriously such actions, particularly as you were, by virtue of your official position, a Senior National Officer responsible for the equipment in the UNICEF Education Section in Dhaka, Bangladesh.
>
> Therefore, while noting the recommendation of the JDC, the Executive Director has decided that given the gravity of such actions, you be separated from service as a disciplinary measure under staff rule 110.3(a). While normally staff on project personnel appointment would only receive thirty days salary in lieu of notice, the Executive Director has exceptionally decided to pay you for three months salary in lieu of notice, as provided in staff rule 109.3, taking into

account that prior to your project personnel appointment you were the holder of a permanent appointment in the National Officer category. ..."

On 6 January 1993, the Applicant requested the Executive Director of UNICEF to reconsider the decision to separate him from the Organization. In a reply dated 14 January 1993, the Division of Personnel informed the Applicant that "the final decision of the Executive Director remains as stated".

On 2 May 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Investigation Committee which framed the initial charges against the Applicant lacked depth and thoroughness, knowingly hid facts, knowingly accepted false evidence, and forged evidence to support charges against the Applicant. Hasty conclusions were drawn from the report of the Investigation Committee, which were forwarded to Headquarters and later disproved, raising questions about the motives of the Representative, whose intention was to malign and punish the Applicant for professional differences.

2. The conduct of the Investigation Committee violated the basic principles and procedures of staff rule 110.4. The Applicant was not informed of the investigation proceedings. He had a right to be informed of the accusations against him and a right to defend himself before the Representative concluded that he was guilty. This was evidenced by the request that he resign immediately, when he was confronted with the charges against him.

3. The request for the Applicant's resignation violates staff rule 209.1(a) which states: "A resignation within the meaning of these rules is a separation initiated by the individual."

Whereas the Respondent's principal contentions are:

1. The United Nations Charter and the United Nations Staff Regulations and Rules require that staff meet the highest standards of integrity. The Secretary-General and, by delegation, the Executive Director of UNICEF have the responsibility to ensure that these standards are maintained.

2. The Applicant's dismissal was preceded by a fair hearing which fully respected his due process rights.

The Tribunal, having deliberated from 12 October to 4 November 1994, now pronounces the following judgement:

I. The Applicant requests, inter alia, that the Tribunal rescind the decision by the Executive Director to dismiss the Applicant for misconduct and order the retroactive reinstatement of the Applicant. He also seeks compensation for psychological trauma and humiliation amongst his colleagues, and requests official reprimand of certain named officials for their conduct in the investigation of his case. The issue before the Tribunal is whether the termination of the Applicant's employment on grounds of misconduct was a valid exercise of the Executive Director's authority.

II. Article 101, paragraph 3 of the United Nations Charter and staff regulations 4.1 and 4.2 call for the recruitment of staff members "of the highest standards of efficiency, competence and integrity." Correlatively, the authority exists to terminate appointments when these standards are no longer met. The Executive Director, by delegation from the Secretary-General of the United Nations, has the authority to dismiss staff members for misconduct pursuant to staff regulation 10.2. In a case of misconduct, the choice of the appropriate disciplinary measure falls within the Secretary-General's discretionary power. In this regard, the Tribunal held in Judgement No. 479, Caine (1990), that:

> "... the Respondent is not required to establish beyond any reasonable doubt a patent intent to commit the alleged irregularities, or that the Applicant was solely responsible for them. The Tribunal's review of such cases is limited to determining whether the Secretary-General's action was vitiated by any prejudicial or extraneous factors, by significant procedural irregularity, or by a significant mistake of fact." (See also Judgements No. 424, Ying (1988) and No. 425, Bruzual (1988))

III. The Applicant claims that UNICEF officials in the Dhaka Office continually "shifted the charges" against him. The central charge made by the Investigation Committee, in its report of 22 April 1992, was the Applicant's alleged involvement "in fraudulent activities which led to the unaccounted six (6) TVs, six (6) VCRs and other related supply and equipment." Along with this main charge, the Applicant was accused of issuing two gate passes to persons not employed by UNICEF.

Based on these charges, the UNICEF officials in the Dhaka Office asked the Applicant for his resignation. Subsequently, having resigned and then withdrawn his resignation, the Applicant responded to the charges against him in a communication to the Investigation Committee. The Investigation Committee consequently submitted a second report, dated 30 June 1992, which involved only two missing TVs and one screen. This second report was transmitted to UNICEF Headquarters in New York on 13 July 1992. A Joint Disciplinary Committee (JDC) was convened to consider the charges of misconduct against the Applicant. In its report submitted on 22 October 1992, the JDC concluded that the Applicant was responsible for only one unaccounted TV and the unauthorized issuing of gate passes.

IV. The Tribunal finds the continuous modification of the findings against the Applicant disturbing, especially in the light of his contention that the investigation lacked thoroughness and was tainted by the manipulation of evidence. A charge of fraudulent activity is a serious and damaging allegation, which may cause humiliation and irreparable harm to the personal and professional

reputation of the accused and to his or her prospects for career advancement. In this instance, the charges led to the termination of the Applicant's employment after nearly twenty years of service with the United Nations. In the circumstances, the Administration is expected to exercise the utmost rigor in investigating charges of misconduct. In this case, the investigative process, which appears to have resulted in a frequent modification of the alleged facts underlying the charges against the Applicant, did not adequately respect the Applicant's right to due process.

V. It is a fundamental right of any staff member accused of misconduct to be informed of the charges against him or her and to be given an opportunity to respond to them. The manner in which the Applicant was initially informed of the charges against him, with a simultaneous demand for his "resignation", deprived the Applicant of an opportunity to respond to the charges before a determination of his culpability was made. There is some evidence that the Applicant may have been subjected to psychological pressure at the two hour meeting attended by two, and at times three, UNICEF officials to discuss the charges against him. The Applicant was suddenly faced with these charges, without any advance notice even of the meeting. Moreover, during that meeting, the Applicant requested and was denied permission to make a telephone call from Hyderabad (India) to Dhaka. Indeed, these unsatisfactory aspects of the case were indirectly referred to by the Director, Division of Personnel, in his letter to the Applicant, dated 1 June 1992, accepting the withdrawal of the Applicant's resignation and stating inter alia:

> "[We] exceptionally agree to disregard your resignation, in view of the seriousness of your allegation and for the purpose of ensuring that justice is fully served."

VI. The JDC subsequently reviewed the charges of misconduct against the Applicant. Its main findings, as summarized in the Applicant's letter of dismissal, were:

"- that [the Applicant] breached UNICEF rules by issuing gate passes, in two separate instances, in fictitious names, and that [the Applicant] knowingly approved the misappropriation of equipment, although not for [his] own personal material gain;

- that [the Applicant] knowingly broke basic rules of conduct and procedure of UNICEF, specifically by authorizing irregular activities on at least two occasions;

- that [the Applicant] contributed to jeopardizing relations between the Government of Bangladesh and UNICEF;

- that [the Applicant is] held responsible and accountable for one missing TV set."

The JDC recommended that disciplinary measures be taken against the Applicant, in the form of demotion, and that he not be considered for promotion or management responsibility for a considerable period in the future. However, the Executive Director concluded that the Applicant's actions indicated "a clear pattern of abuse of UNICEF's rules and regulations". He therefore decided to terminate his appointment as a disciplinary measure, with payment of three months net base salary in lieu of notice of termination.

VII. Notwithstanding the Executive Director's discretionary power in this respect, his conclusion that the Applicant's actions constituted "a clear pattern of abuse of UNICEF's rules and regulations", which formed the basis of his decision, is not fully supported by the evidence before the Tribunal. The Executive Director asserted, in his letter to the Applicant of 29 December 1992, that this conclusion was based upon the facts and findings of the JDC report. However, the JDC found the Applicant guilty of less than what he was charged with. For example, in paragraph 4.1 of its report, concerning "Allegation of Misconduct No. 2.1", the JDC concluded:

"The currently unaccounted items are 1 TV, and 2 VCRs, as much of the original missing equipment has been located and/or returned. There is no evidence that the S/M [staff

> member] was responsible for the missing two VCRs. The S/M is held responsible and accountable for the one missing TV."

Similarly, with respect to "Allegation of Misconduct No. 2.2" the JDC concluded in paragraph 4.2 of its report:

> "There is no evidence that the staff member personally despatched any goods or equipment. Only in the two cases where the staff member requested and approved gate pass [sic], is he considered by the JDC to be in breach of normal UNICEF rules and procedures."

These conclusions do not indicate that there was a pattern of abuse with which the Applicant was initially charged.

VIII. The fact that the Executive Director did not follow the recommendation of the JDC to demote the Applicant and decided instead to terminate the Applicant's appointment did not, in the Tribunal's view, violate the Applicant's rights, as recommendations of the JDC are advisory. (Cf. Judgement No. 582, Neuman (1992)). However, the decision to separate the Applicant must be considered in the light of the procedural irregularities which took place in the initial stages of the investigation. The Executive Director's decision to separate the Applicant for misconduct, despite the JDC's recommendation for more lenient disciplinary sanctions, was apparently based on a factual finding which is not fully supported by the findings of the JDC. In addition, the procedural irregularities in the conduct of the initial phase of the investigation deprived the Applicant of his right to be informed of the charges against him and to present a defence. In the light of these circumstances, the Tribunal finds that the decision to terminate the Applicant's appointment was tainted by procedural irregularities. For this, the Applicant is entitled to compensation.

IX. The Tribunal, however, agrees with the Executive Director's conclusion that the actions and omissions of the Applicant, on which

his decision to separate him were based, constituted a breach of trust and displayed a lack of honesty and trustworthiness which demonstrated that the Applicant did not meet the standard required of an international civil servant.

X. For the reasons set forth above, the Tribunal orders the Respondent to pay to the Applicant five months of his net base salary at the time of his separation from service.

All other pleas are rejected.

(Signatures)

Samar SEN
President

Francis SPAIN
Member

Mayer GABAY
Member

New York, 4 November 1994

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/674
4 November 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 674

Case No. 752: GONDA

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, Vice-President, presiding; Mr. Mikuin Leliel Balanda; Mr. Mayer Gabay;

Whereas at the request of Cyriaque Gonda, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application with the Tribunal to 31 August 1993;

Whereas, on 30 August 1993, the Applicant filed an application containing pleas which read, in part, as follows:

"II. Pleas

...

... to submit my contract to the body legally invested with the power to convert it or extend it within the time-limits established by the rules.

... to compensate me for the services I rendered, at the expense of great sacrifices, after the end of the established two-year period.

... to apply the appropriate provisions in case of separation (if that should occur), in particular the appeals procedure and the application of staff rule 109.3(b).

D. ... [to pay] compensation of at least nine hundred and fourteen thousand seven hundred and forty-three American dollars and sixty-three cents, in accordance with article 9, paragraph 1, of the Statute.

...

[To rescind] ... the decision of the Secretary-General and [to continue] ... my appointment."

Whereas the Respondent filed his answer on 22 November 1993;

Whereas the Applicant filed written observations on 29 January 1994;

Whereas the Applicant filed corrections to his written observations on 1 February 1994;

Whereas the Applicant submitted additional documents on 12 October 1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 31 December 1989, on a two-year probationary appointment as an Associate Recruitment and Placement Officer, General Service Staffing Section, Recruitment and Placement Division (RPD), Office of Human Resources Management (OHRM), at the P-2 level. He was separated from service on the grounds of misconduct, with effect from 18 February 1993.

On 22 October 1991, the Applicant had completed his section of a performance evaluation report (PER), covering the period 31 December 1989 to 31 October 1991. On 23 December 1991, the Chief, General Service Staffing Section, RPD, OHRM, signed the PER as first reporting officer, and on 10 January 1992, the Director, RPD, signed the PER, giving the Applicant an overall rating of "a good performance." On 23 April 1992, the Assistant Secretary-General, OHRM, signed the PER.

Prior thereto, following allegations that the Applicant had engaged in sexual harassment, the Director, Staff Administration and Monitoring Service, had established an informal Board of Inquiry to

investigate these allegations. The Board of Inquiry held ten meetings in late 1991 and early 1992, during which a number of interviews were conducted. On 6 January 1992, the Board of Inquiry submitted its report to the Director, Staff Administration and Monitoring Service. The conclusions of the report read, in part, as follows:

> "...
>
> 37. ... [the Applicant] has conducted himself in a manner that is inappropriate. At the same time, the Board considers that the extent of [the Applicant's] misconduct should be judged against the backdrop of the Organization's responsibility in guiding and supervising newly recruited, young and inexperienced staff members."

On 14 February 1992, the Assistant Secretary-General transmitted the report of the Board of Inquiry to the Applicant, noting that the Board had not established any misconduct on the Applicant's part but requesting him to bear in mind the Board's observations in his future dealings with candidates and colleagues.

On 27 February 1992, an applicant for employment with the United Nations wrote a letter of complaint to the Chief, General Service Staffing Section. She stated that she had come to the United Nations seeking a secretarial position, and the Applicant had suggested that she take English and typing courses. She had requested money for these courses from her parents, who had sent her a cheque, which the Applicant offered to cash for her. She stated that he had cashed two cheques for her, but had not given her money for the third cheque, in the amount of $380, which he had taken. She said that a friend had tried to convince him to give her the money and that he had replied "that he had done a lot for [her]." She concluded with the request, "I hope you'll be able to make him give me my parents money to pay for my school."

On 3 March 1992, the Director, RPD, forwarded this letter to the Assistant Secretary-General, OHRM, and informed him that he had questioned the Applicant on the allegations contained therein. The

Applicant had explained that the job applicant who wrote the letter was a classmate and close friend of his brother's, that she had often visited his home, and that his family had been helpful to her on many occasions. He said that it was his brother who had cashed the cheques for her, that he "had been aware of some confusion regarding the third cheque," and that he had given his brother the money to send her, and told her that the money was being mailed. The Director, RPD, reported that he had then called the job applicant to ask whether she had received the money. She told him that "she was not a friend of [the Applicant's] brother, that they had never been students together, and that she had only met his family on 31/12/91 when [the Applicant] had invited her to his home ..." With respect to the third cheque, she confirmed that they had discussed it recently but that the Applicant told her that he had lost the cheque. In conclusion, the Director, RPD, stated:

> "In view of the wide discrepancies between the two versions of the situation and the possibility of inappropriate conduct on the part of [the Applicant] in his relations with an applicant, I propose that SATD [Staff Administration and Training Division] be requested to investigate this incident."

Subsequently, in a note for the file, dated 20 March 1992, a Personnel Officer indicated that the job applicant had confirmed that she had received from the Applicant the proceeds of the third cheque. The Personnel Officer recorded his telephone conversation with her, noting:

> "[She] stressed that she met [the Applicant] only when she applied for employment with the United Nations. He tried to date her and had called her at home on some occasions. Considering his assurances and offers of help, she did not know how to best deal with him because she did not want to lose her opportunity to work for the UN ..."

In a letter dated 20 March 1992, to the Assistant Secretary-General, OHRM, the Director, RPD, made reference to the calls he had received from the job applicant regarding the cashing of her cheque, and stated further that:

> "... even though no disciplinary action has been taken, [the Applicant] has now behaved on two occasions in a manner incompatible with the conduct expected of a Recruitment and Placement Officer, acting towards applicants for employment in ways that reflect on the integrity of the Recruitment and Placement Division.
>
> In the circumstances, I am not in a position to recommend that he be offered a permanent appointment in his present functions."

On 29 June 1992, in a note for the file, the Officer-in-Charge, Allowances and Benefits Unit, recorded that she had been contacted several times since September 1991 by the Bursar of the school in which the Applicant's three children were registered for the academic year 1991/1992. After the first call, she certified to the Bursar the payment of an education grant advance to the Applicant. She noted that the Bursar subsequently called, two or three times, concerning late payment of the school fees by the Applicant. In February, he called again to inform the Officer-in-Charge, Allowances and Benefits Unit, that the children had been expelled from the school because of the recurrent late payments and the fact that most of the Applicant's cheques had been dishonoured by the bank on which they had been drawn. In a letter dated 13 May 1992, the Bursar indicated the particulars of the payments made by the Applicant, totalling $11,771.07, which was less than the $13,110.00 he had received as an advance on 8 October 1991, and less than the $20,950.60 due for tuition.

On 30 June 1992, the Director, SATD, OHRM, wrote to the Applicant regarding the review of his probationary appointment. She added that before the review, she wished "to request your comments on certain allegations which have been made against you, and on

which you have not had the opportunity to present your views for the record." The allegations transmitted to the Applicant for comment were (i) his failure, for almost a year, to remit to a job applicant the funds he obtained in cashing a cheque for her; and (ii) his failure to remit to the school in which his children were registered, the full amount he had received from the United Nations as an advance on his education grant. She requested the Applicant's comments by 17 July 1992.

In his first comments on the allegations, dated 7 July 1992, the Applicant claimed that the job applicant was "not as you say in your memorandum, a candidate for employment that I happened to know through my work as RPO [Recruitment and Placement Officer]," but rather a "very good and longtime friend of my family ..." With regard to the education grant advance, the Applicant explained that he had withdrawn his children from the school "due to the intolerable and inhuman and uncivilized treatment that my children were subjected to ..." In conclusion, he stated that he was "tired of this systematic victimization."

In subsequent comments, dated 10 July 1992, the Applicant noted that his probationary appointment, effective 31 December 1989, should have been reviewed before December 1991. He claimed that under staff rule 104.12(a), as his probation had not formally been extended, he had the right to expect an automatic conversion to a permanent appointment.

On 4 August 1992, the Director, SATD, OHRM, informed the Applicant that the Secretary-General had decided to refer his case to the Joint Disciplinary Committee (JDC) as he had "failed to meet the standards of integrity expected of international civil servants". Thus, he had failed to remit the proceeds of a cheque he had cashed for a job applicant, failed to use the full amount of the education grant advance he had received from the United Nations to pay the educational institution, in accordance with its payment schedule and he had not informed the United Nations of his lesser payments.

On 26 January 1993, the JDC adopted its report. Its considerations and conclusion read, in part, as follows:

"...

20. The Panel observes that it is for the staff member to demonstrate his integrity during the period of probation. The Administration is not required to prove beyond a reasonable doubt that the staff member is guilty of misconduct even once - much less thrice. The Administration is required to come to a reasonable judgement as to a staff member's fitness for permanent appointment on the basis of its observation of his conduct and performance, and it must be prepared to justify that judgement in the event of an appeal. The Panel sees no reason for the Administration to have invoked the costly and cumbersome disciplinary process, instead of making a rational judgement as to [the Applicant]'s fitness for permanent appointment on the basis of the facts already available to it.

21. The Panel felt, nevertheless, that it had to deal with the two charges referred to it. In the first, concerning [the job applicant] and the checks, the Panel found [the Applicant's] several statements difficult to reconcile and, consequently, difficult to believe. For example, he told the Panel that there had been no third check, and that he had paid her for it twice - once before she complained, and once after. Again, that, on the advice of counsel - who did not appear - he had signed a statement that there were three checks, but, actually, there were only two, but he had paid her four times. On this charge, the Panel finds that the Administration has not proven misconduct. By his testimony, however, [the Applicant] has created strong doubts as to his veracity.

22. In his testimony on the second charge, [the Applicant] again gave cause to question his credibility. For example, despite his several assertions concerning his commitment to his children's welfare, he could not remember the name of the school they attended from March to June of 1992. The Panel noted that [the Applicant] was not a stranger to the education grant procedures; he had been through them twice before. He should have informed and reimbursed the Organization promptly, even though the Administration had been less than diligent in following up.

23. [The Applicant] acknowledged that at least one of his checks was returned for insufficient funds and that at least one other of his payments to the Lyceum Kennedy was late. There was no explanation offered why he had retained the remainder of the advance until (at least) the date of his

testimony. It was clear to the Panel that he had, as charged, used UN monies for purposes other than that for which it had been advanced to him, and that, therefore, he was guilty of misconduct.

24. The Panel also concluded that [the Applicant] still owed money to the Lyceum Kennedy, and that his relations with that school had tended to bring the UN into disrepute.

...

Conclusion

26. The Panel finds that [the Applicant] does not meet the standards of integrity required of an international civil servant and is, therefore, not worthy of permanent appointment."

On 12 February 1993, the Director of Personnel transmitted the JDC report to the Applicant and informed him, inter alia:

"The Secretary-General ... has taken note of the Committee's finding that you had, as charged, used UN monies for purposes other than that for which those monies had been advanced to you and that, therefore, you were guilty of misconduct. He has also taken into consideration the entirety of the record in your case, including a prior finding by the Board of Enquiry of inappropriate conduct. The Secretary-General has concluded that your conduct has seriously deviated from the UN standards of conduct and integrity expected of each staff member of the Organization and this misconduct is incompatible with continued service with the Organization.

Pursuant to his discretionary authority to impose an appropriate disciplinary measure, the Secretary-General has decided to separate you from service for misconduct under staff regulation 10.2 paragraph 1 and staff rule 110.3(a)(vii) with effect from the date you receive this letter. The Secretary-General has also decided that you be paid compensation in lieu of notice in accordance with staff rule 109.3(b) and an indemnity pursuant to Annex III(c) to the Staff Regulations in the amount of one half of the termination indemnity provided under paragraph (a) of the same Annex."

On the same date, the Applicant wrote to the Secretary-General, noting that after his two years of probationary service, on 23 December 1991, he had been given a satisfactory performance evaluation and that the Chief, General Service Staffing Section, and the Assistant Secretary-General, OHRM, "assured me at that time that it was only a matter of formality to finalize the conversion of my contract to permanent ..." He requested urgent consideration of the matter.

In a reply dated 25 February 1992, the Officer-in-Charge, OHRM, recalled that during the Applicant's employment, serious allegations had been made against him which had been investigated by the JDC. In light of the JDC's recommendation, the Secretary-General had decided to impose the disciplinary measure of termination.

On 30 August 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Secretary-General's decision to dismiss him for misconduct was made on the basis of an improper assessment of facts and procedural errors. Any decision relating to the eligibility of the Applicant for permanent appointment, following the two year probationary period, should have been made by the Appointment and Promotions Committee, in accordance with staff rule 104.13, and not by a JDC.

2. In accordance with staff rule 104.12(a), the Applicant has the right to automatic conversion of his probationary appointment to a permanent appointment, as his probation was not formally extended and he was given a satisfactory performance evaluation.

Whereas the Respondent's principal contention is:

The Secretary-General has broad discretion with regard to disciplinary matters, including determinations of what constitutes misconduct warranting dismissal. The Secretary-General's decision

to dismiss the Applicant was a valid exercise of that discretionary authority, and was not vitiated by a mistake of fact, lack of due process, prejudice, or other extraneous factors.

The Tribunal, having deliberated from 13 October to 4 November 1994, now pronounces the following judgement:

I. The Applicant seeks the rescission of the decision of the Secretary-General to dismiss him for misconduct. In addition, he seeks damages of $914,743 in compensation for the moral, physical and professional harm he suffered.

The Applicant argues that: (1) the Secretary-General's decision to dismiss him for misconduct was reached by an improper assessment of facts; (2) the decision was vitiated by errors of procedure; and (3) the Applicant's probationary appointment had exceeded two years; as he had performed satisfactorily during this period, his separation from service constituted a violation of his rights. Indeed, the issue in this case is essentially whether the rights of the Applicant were violated by his dismissal for misconduct.

The Applicant has requested the production of documents and witnesses. The Tribunal has considered these requests and decides to reject them. The information already before the Tribunal is adequate for the resolution of the case.

II. The Applicant was recruited by the United Nations and given a probationary appointment on 31 December 1989. He served as an Assistant Recruitment and Placement Officer at the P-2 level. As a staff member of the United Nations, he had the responsibility to fulfil certain obligations under the Charter and the Staff Regulations (Judgement No. 377, Jabri (1986). Staff regulation 1.4 sets forth those basic obligations:

> "Members of the Secretariat shall conduct themselves at all times in a manner befitting their status as international civil servants. They shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. They shall avoid any action ... which may adversely reflect on their status, or on the integrity, independence and impartiality which are required by that status. ..."

III. The Respondent determined that the Applicant failed to meet his obligations and dismissed him for misconduct. The responsibility to appoint staff members and the corollary power to dismiss them is vested in the Secretary-General. Article 101 of the Charter states that the Secretary-General must give paramount consideration to employing staff of the "highest standards of efficiency, competence and integrity" (emphasis added). Correlatively, when staff do not meet these standards, the Secretary-General has the responsibility to discipline them. This Tribunal has held, in a number of previous decisions, that the choice of disciplinary measure to be imposed on those failing to meet those standards falls within the Secretary-General's discretionary power (Judgements No. 424, Ying (1988); No. 425, Bruzual (1988) and No. 429, Beyele (1988)). The choice of dismissal as a disciplinary measure is available and is set forth in staff rule 110.3.

IV. Throughout his application, the Applicant insists that his dismissal was illegal. One of his main contentions is, that it was for the appointment and promotion bodies to determine his qualification for permanent appointment and this decision was not to be based on advice from the Joint Disciplinary Committee (JDC).

V. It is clear to the Tribunal that the charge against the Applicant was one of misconduct; he was not being reviewed for appointment or promotion. If misconduct charges are to be considered, these charges must be reviewed in the context of JDC

proceedings and not in the context of a contract review where the due process safeguards of the disciplinary process are not present (Judgement No. 610, Ortega (1993)). In fact, staff rule 110.4(b) provides that except in the case of summary dismissal, no disciplinary measure may be imposed until the matter has been referred to the JDC. Only the JDC has jurisdiction to hear disciplinary cases.

VI. Turning to the charges of misconduct which led to the Applicant's dismissal, the Tribunal, at the outset, reiterates a point made by the JDC when it reviewed this case. During the probationary period, it is the responsibility of the staff member to demonstrate his or her integrity. The Respondent is not required to prove beyond a reasonable doubt that a staff member is guilty of misconduct. He is only required to come to a reasonable judgement on the staff member's fitness for permanent appointment, based on the observation of his or her conduct and on the evaluation of his or her performance.

VII. The Tribunal notes the Applicant's dissatisfaction with the tenor of the JDC report's ultimate conclusion that he was not worthy of permanent appointment. Although it would have been desirable for the JDC, in keeping with its mandate, to state its recommendations in terms of disciplinary action, in this case, the Tribunal considers this point a matter of semantics. The Tribunal finds, as the Respondent evidently did, that the JDC's statement was tantamount to a recommendation of dismissal. It is clear that the JDC found that the Applicant had engaged in misconduct and had failed to meet the standards required of an international civil servant.

VIII. The Applicant's history at the United Nations was problematic. In late 1991 and early 1992, a Board of Inquiry investigated allegations of sexual harassment made against the

Applicant by several women candidates for job openings within the domain of the Applicant's responsibility. Following its investigation, the Board concluded that the Applicant "had conducted himself in a manner that was inappropriate".

On 27 February 1992, an applicant for employment complained to the United Nations that the Applicant obtained a cheque from her for $380.00 on the representation that he would cash it for her. He then failed to remit the proceeds. She claimed that she had met the Applicant when she applied for employment with the UN. It was only a year later, following her complaint, that the Applicant remitted the proceeds to her.

In reviewing this incident, the Tribunal fully agrees with the JDC in its conclusion that the Applicant's explanation regarding the charge lacked veracity. He made contradictory statements which led the JDC and now leads the Tribunal to question his credibility.

IX. The third incident which occurred during the Applicant's employment with the UN relates to the education grant advanced by the Organization for the Applicant's children. The Applicant failed to use the full amount of the advance to pay the educational institution in accordance with its payment schedule. He failed to inform the Organization that the educational expenses actually paid by him were substantially lower than those on which the advance had been based. The Applicant claims that the Respondent overstepped his powers by involving himself in his private life. This was not the case. "The Standards of Conduct in the International Civil Service" provide:

> "53. In principle, the private life of the international staff member is his concern and should not be intruded upon by his organization. At the same time, in order that his private life will not bring his organization into disfavour, he must set himself a high standard of personal conduct ...
>
> 54. Scrupulous compliance with laws of the host country, ... honouring of financial obligations - these are only a few of the obvious requirements which derive from the general principle."

X. The Tribunal observes that the Applicant glosses over the issue of misconduct and attempts to minimize its seriousness. His main contention is that the Organization wronged him by not granting him a permanent position. His claim is that the Organization is using these charges in order not to grant him such a position, which he strongly believes is due to him. The Applicant contends that, in dealing with his case, the Respondent acted in an abusive and prejudicial manner. The Tribunal has carefully studied the Applicant's submission. It is of the view that the Applicant has not established his case; his contentions are at times erroneous and at times incoherent.

The Tribunal has consistently held that the burden of proving prejudice or other improper motivation rests with the one affirming it. (Cf. Judgements No. 465, Safavi (1989) and No. 336, Maqueda Sanchez (1984)). The Applicant has failed to meet this burden of proof.

XI. The Tribunal agrees with the Secretary-General's conclusion that the Applicant's conduct has seriously deviated from the UN standards of conduct and integrity expected of each staff member of the Organization and that this is incompatible with continued service with the Organization.

XII. The Tribunal concludes that the Applicant's rights were not violated by his dismissal. The Secretary-General acted within his discretionary power to separate the Applicant from service for misconduct. This was not vitiated by a mistake of fact, by lack of due process or by prejudice or any other extraneous factors. The Applicant was paid the appropriate compensation in lieu of notice, in accordance with staff rule 109.3(b), and an indemnity pursuant to Annex III(c) to the Staff Regulations.

XIII. In the light of the above, the Tribunal rejects the application in its entirety.

(Signatures)

Jerome ACKERMAN
Vice-President, presiding

Mikuin Leliel BALANDA
Member

Mayer GABAY
Member

New York, 4 November 1994

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/675
4 November 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 675

Case No. 750: ARAIM

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Jerome Ackerman, First Vice-President; Mr. Luis de Posadas Montero, Second Vice-President;

Whereas, on 17 August 1993, Amer Araim, a staff member of the United Nations, filed an application requesting the Tribunal, inter alia, to find that:

"...

4. The Administration violated the right of the Applicant to receive the full and fair consideration for [a] vacant relocated D-1 post ... as well as other vacant D-1 posts in the Secretariat ...

And, consequently,

5. ... to give full and fair consideration for the Applicant's candidature for the relocated D-1 post of Secretary of the Special Committee against Apartheid as well as other D-1 posts in the Secretariat in which he is interested and for which he is qualified.

6. To award the Applicant compensation equal to two years net base salary for the injury sustained by him as a result of the ongoing discrimination against him, including the refusal to consider his candidature for [the above] D-1 post ... as well as other D-1 positions in the Secretariat ..."

Whereas the Respondent filed his answer on 5 October 1993;

Whereas the Applicant filed written observations on 12 October 1994;

Whereas, on 24 October 1994, the Applicant submitted an additional statement;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 8 August 1978, on secondment from the Government of Iraq, on a three year fixed-term appointment, as a Political Affairs Officer at the P-4 level. On 1 June 1981, he was reassigned to the Committee Services and Research Branch of the Centre Against Apartheid. On 8 August 1981, after the Applicant's resignation from the service of his government, his appointment was extended for three years. On 1 April 1982, he was promoted to the P-5 level, as Senior Political Affairs Officer, and became Secretary of the ad hoc Committee on the Drafting of the International Convention against Apartheid in Sports and Deputy Secretary of the Special Committee against Apartheid. On 1 May 1984, he received a probationary appointment, which was converted to a permanent appointment on 1 January 1985.

In a report dated 3 July 1990, the Joint Appeals Board (JAB), having considered an appeal from the Applicant against the Administration's decision to fill, through replacement by an outside candidate, the post of Chief, Committee Services and Research Branch, concluded that this decision was "flawed". It recommended "that the post be filled through vacancy management and that [the Applicant] be considered fully and fairly along with other candidates." Following the Secretary-General's subsequent decision not to accept the JAB recommendation, the Applicant filed a complaint with the Panel on Discrimination and Other Grievances, as well as an application with the Tribunal. On 1 July 1991, the Interim Coordinator of the Panel transmitted the Panel's recommendations to the Administration, including a recommendation that "the Administration should investigate and properly deal with

the very subtle form of discrimination which seems to have prevailed in the Department." The Tribunal, in its Judgement No. 533, directed that "the Applicant receive full and fair consideration" for any vacant D-1 post for which he might be qualified.

In June 1991, when the Secretary of the Special Committee against Apartheid died, the Applicant was appointed Acting Secretary. In a letter dated 14 August 1991 to the Assistant Secretary General, Office of Human Resources Management (OHRM), the Applicant expressed his interest in the post. On 3 September 1991, the Assistant Secretary-General, Centre Against Apartheid, announced that the former Permanent Representative of Ethiopia to the United Nations had been appointed temporarily to the post for seven months. The Applicant lodged an appeal against this decision with the JAB and then with the Tribunal. In its Judgement No. 622, the Tribunal held that he was entitled to compensation because of the unjustified failure to advertise the post, which deprived him of an opportunity to be considered for it. (Cf. Judgement No. 622, Araim (1993)).

In a letter dated 15 September 1992, the Applicant reminded the Assistant Secretary-General, OHRM, of his letter of 16 June 1992, informing the Applicant that the Secretary-General had decided to constitute a panel to investigate his claims of discrimination. The Applicant noted that three months had elapsed and asked that the panel be set up promptly, and that it "investigate not only my case but also the cases of other Arab staff members in the former Department of Political and Security Council Affairs, as suggested by the Panel on Discrimination and Other Grievances."

On 14 October 1992, the Applicant requested the Secretary-General to review the administrative decision to transfer the D-1 post from the Centre Against Apartheid to the Department of Political Affairs. On 19 November 1992, the Applicant filed an appeal with the JAB, requesting inter alia a suspension of action on the transfer of this post.

On 10 December 1992, the Director of Personnel wrote to the Applicant and informed him that the advertisement for the vacant D-1

post had to be withdrawn in the light of the restructuring of the Department of Political Affairs. He assured the Applicant that he would receive full and fair consideration for any D-1 vacancy in the Department for which he was qualified. He also informed him that an ad hoc panel had been appointed to investigate his allegations of discrimination.

In a letter dated 14 January 1993, the Director of Personnel informed the Applicant that the Secretary-General had requested the JAB to complete consideration of his appeal and submit its report by 21 March 1993. The decision on which suspension of action had been requested would not, in any event, take effect before 21 April 1993.

On 18 March 1993, the JAB, noting the Applicant's contention that he had not been considered for the redeployed vacant D-1 post, or for three other vacant D-1 posts in the Department of Political Affairs, requested from the Secretary-General information on the results of the ad hoc panel which had been appointed to investigate his allegations of discrimination, as well as information on the Applicant's candidature for the vacant D-1 posts in the Department. The JAB also requested an extension of the date on which its report was due, to allow more time for the consideration of the appeal.

On 28 April 1993, the report of the ad hoc panel was finalized. In a letter dated 24 May 1993, the Under Secretary-General for Administration and Management informed the Applicant of its conclusion that "your allegation that your non-selection for the posts in question was due to discrimination was totally unsubstantiated." The letter also stated, "I hereby reject on behalf of the Secretary-General your allegations that you have been and continue to be victim of discrimination in the Organization. No action in this regard will therefore be taken." With the letter, a copy of the ad hoc panel's report was transmitted to the Applicant "on condition of strict confidentiality". The report was not transmitted to the JAB.

On 25 May 1993, the JAB adopted its report, noting that it had received "no information on the conclusion of the ad hoc

Investigation Panel, which, in its opinion, could have considerable bearing on its findings and conclusion." The report's conclusions and recommendations were:

> "83. The Panel unanimously:
>
> Finds that it was not provided with the information it had requested so as to be able to give the appeal all due consideration;
>
> Finds that, without that information, it is unable to examine the validity of the claims of the Appellant and/or the contentions of the Administration;
>
> Finds that it is not in a position to make an honest recommendation regarding the present case.
>
> 84. The Panel therefore unanimously decided to make no recommendation in connection with the appeal."

On 24 June 1993, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him, in part, as follows:

> "The Secretary-General notes the conclusion of the Joint Appeals Board and its inability to make [a] recommendation on the case, for reasons stated. The Panel has alluded, ..., to the fact that you have been considered by the Department's promotion review panel together with other eligible staff members to the various vacant D-1 posts in the sector of the Department where you are located. In effect, the Secretary-General believes that you have received full and fair consideration in the promotion process of the Department.
>
> On 24 May 1993, I have already conveyed to your the decision of the Secretary-General which I made on his behalf, that your allegation of discrimination was unsubstantiated. That decision is final."

On 17 August 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The JAB was prevented from fulfilling its mandate due to the Administration's refusal to provide information requested by it.

2. The Panel on Discrimination and Other Grievances adopted two separate reports on 1 July 1991 and on 1 October 1992, confirming that the Applicant was subjected to discrimination, and that the Administration failed to act.

3. The Applicant has not received full and fair consideration in the promotion process of the Department, contrary to the assertions of the Respondent.

Whereas the Respondent's principal contentions are:

1. No staff member may appeal the restructuring of his or her department. The Applicant adduces no credible evidence that prejudice led to his department's reorganization. The onus of proof is upon him to establish improper motivation.

2. A comprehensive investigation of the Applicant's allegations of generalized racial prejudice, directed against him in the Administration's refusal to promote him, was conducted by a panel appointed by the Secretary-General. Its report of 28 April 1993, which did not accept these allegations, was the basis for a decision taken by the Administration on 24 May 1993. If the Applicant is dissatisfied, he should appeal that decision of 24 May 1993.

The Tribunal, having deliberated from 20 October to 4 November 1994, now pronounces the following judgement:

I. In the course of its deliberations, the Tribunal found defects in procedure which, in accordance with the terms of article 9, paragraph 2 of the Tribunal's Statute and article 18 of

the Rules of the Tribunal, warrant the remand of the case for their correction. The defects in procedure are indicated below.

(A) In response to its request for information regarding the consideration of the Applicant for promotion to the D-1 level, inadequate information was provided to the Joint Appeals Board (JAB) by the Respondent, in the form of a summary memorandum. The Tribunal considers that the JAB should have been provided with underlying and supporting documentation, such as the minutes, notes, or other records of the APB, with appropriate deletion of names (other than the Applicant's) in the interests of confidentiality.

(B) In its report, dated 25 May 1993, the JAB found "that it was not provided with the information it had requested so as to be able to give the appeal all due consideration" and that "without that information, it [was] unable to examine the validity of the claims of the Appellant and/or the contentions of the Administration." In spite of the fact that the JAB's request for the ad hoc panel's report was not met and notwithstanding the JAB's statement that it was not "in a position to make an honest recommendation regarding the ... case," the Secretary-General took a decision on 24 June 1993, based in part, on the ad hoc panel's report.

II. On 20 October 1994, the Executive Secretary of the Tribunal informed the parties, pursuant to article 18 of the Rules of the Tribunal, that it would decide on the substance of the case if, on the expiry of the time limit of two days, no request for a remand had been made by the Secretary-General.

III. On 21 October 1994, the Representative of the Secretary-General requested the Tribunal, in accordance with article 18 of the Rules of the Tribunal, prior to the determination of the merits, to remand the case to the JAB for correction of the above-mentioned defects in the procedure.

IV. The Tribunal, without pronouncing on the merits of the case, decides (1) that the case be remanded for correction of procedure in accordance with article 9, paragraph 2 of the Statute of the Tribunal; (2) that no harm has been caused to the Applicant by the procedural delay and hence does not award him any compensation.

(Signatures)

Samar SEN
President

Jerome ACKERMAN
First Vice-President

Luis de POSADAS MONTERO
Second Vice-President

New York, 4 November 1994

R. Maria VICIEN-MILBURN
Executive Secretary